TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible] 1914

No. [illegible] 2

MISSOURI, KANSAS AND TEX[illegible]WAY COMPANY,
APP[illegible]

vs.

THE UNITED STATES.

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APPEAL FROM THE COURT OF CLAIMS.

FILED MARCH 21, 1912.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 1033

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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IN THE COURT OF CLAIMS OF THE UNITED STATES.

No.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY

v.

THE UNITED STATES OF AMERICA.

PETITION.

The petition of the Missouri, Kansas and Texas Railway Company for breach of the covenants of its grants of lands in the Indian Territory under acts of Congress of the United States herein set forth, and the ascertainment of and judgment for its damages resulting therefrom, respectfully shows:

Your petitioner is duly chartered, organized, and existing under the laws of the State of Kansas, one of the States of the United States of America, and owns or controls and operates lines of railway so controlled and owned in the States of Missouri and Kansas and the Territory of Oklahoma and the Indian Territory, with principal termini at the cities of St. Louis, Hannibal, and Kansas City, in the State of Missouri, at Junction City, in the State of Kansas, and at the Red river, at the northern line of the State of Texas, consisting of seventeen hundred and twenty-five (1725) miles, more or less. Your petitioner's railways con-

nect at the State line of Texas and the Indian Territory with the railways of The Missouri, Kansas and Texas Railway Company of Texas, a corporation organized and existing under the laws of the State of Texas, and are operated in connection and harmony with the railways of said Texas Company in the States of Texas and Louisiana, consisting of thirteen hundred and forty-seven (1347) miles, more or less. The railroads of the said two companies constitute what is popularly known as the Missouri, Kansas and Texas Railway System, and are accurately outlined on a map herewith presented, marked Exhibit "A," and made a part hereof, the roads in Texas and Louisiana being the railroads of the said Texas Company and those north of Texas the railroads of your petitioner. The twenty mile limits of the land grants through the Indian Territory herein claimed by your petitioner are shown on said map.

Your petitioner was originally incorporated under the corporate name of *Union Pacific Railway Company, Southern Branch*, under an act of the legislature of the State of Kansas entitled "An act providing for the incorporation and regulation of railway companies," approved February 13, 1865, by filing its charter and articles of incorporation, dated September 20, 1865, with the Secretary of State of the State of Kansas on September 25, 1865, as required by said act of the legislature, for the purpose of constructing a line of railway commencing at or near Fort Riley, or the junction of the Republican and Smoky Hill forks of the Kansas river, and on the line of the Union Pacific Railway, Eastern Division, running thence south via Clarke's creek and the Neosho river to a point at or near where the southern boundary of the State of Kansas crosses said Neosho river, with the power to extend the same in a southerly direction across the Indian Territory.

Your petitioner further shows that by due corporate action, by unanimous vote of its stockholders and in conformity with the laws of the State of Kansas, the corporate name of the said Union Pacific Railway Company, Southern

Branch, was, from and after the 4th day of April, 1870, changed to and made and has been since and now is *Missouri, Kansas and Texas Railway Company.*

Your petitioner further shows that by an act of the State of Texas passed August 2, 1870, entitled "*An act in relation to the Missouri, Kansas and Texas Railway Company (late Union Pacific Railway Company, Southern Branch),*" your petitioner, which was in said act recited to be a corporation authorized by Congress to construct a railway into and through the Indian Territory, was granted the right to extend its railroad, together with its telegraph lines, from some convenient point on the Red river between Preston (now Denison) and Doaksville, where its road should cross from the Indian Territory to the State of Texas, into and through the State of Texas in the general direction of Waco and Austin to the Rio Grande, with the view of extending the same to Camargo and the City of Mexico, in the Republic of Mexico, together with the right to build branch lines and acquire railroads of connecting companies; and by said act your petitioner was authorized to have and exercise all the rights, powers, privileges and immunities granted by its acts of incorporation and amendments thereof, so far as the same might be applicable to the construction of its lines of railway in the State of Texas not inconsistent with the Constitution of the State of Texas, together with all the rights, powers and privileges, benefits and immunities conferred by the general laws then existing or which should thereafter be passed by the State of Texas in relation to railroad corporations in the same manner and to the same extent as though incorporated under the laws of the State of Texas. Your petitioner further shows that on March 2, 1871, the legislature of the State of Kansas passed an act entitled "*An act in relation to the Missouri, Kansas and Texas Railway Company (late Union Pacific Railway Company, Southern Branch),*" wherein it was and is recited that inasmuch as your petitioner had acquired and become vested with certain

rights, privileges, franchises, and property in the Indian Territory under certain acts of the Congress of the United States, meaning the acts of the Congress of July 25, 1866, and July 26, 1866, herein referred to, with the right to extend and operate its road into and through the Indian Territory, and had likewise become vested with certain rights, privileges, franchises, and property in the State of Texas under acts of the legislature of said State, including the right of extending and operating its railroad into and through said State of Texas, and further reciting that it was for the interest of your petitioner, as well as the interest of the public generally, that in constructing and operating its road, branches, and extensions, as aforesaid, that so far as practicable your petitioner should "*have, exercise and enjoy a uniformity of powers over its whole line of road; therefore it is hereby enacted that the said Missouri, Kansas and Texas Railway Company in constructing, extending and operating its road, shall have, possess and enjoy, and is hereby vested with the same rights, privileges, powers and immunities over its whole line, that it now has and enjoys over any part or portion thereof, by virtue of any laws of Kansas, including the right to increase its capital stock.*"

Your petitioner states that it is what is known as one of the *land-grant railroads* of the United States, and under its original name of Union Pacific Railway Company, Southern Branch, it was granted and became entitled to the benefit of grants of lands to it from the United States of America by acts of Congress of March 3, 1863, July 1, 1864, July 25, 1866, and July 26, 1866. The history of these land grants to your petitioner is:

On the 3d day of March, 1863, the Congress of the United States passed an act entitled "*An act for the grant of land to the State of Kansas in alternate sections for the aid in the construction of certain railroads and telegraphs in that State*" (12 Stat. L., 772), and that among the railroads for whose benefit aid was granted by said act, was a line of railway ex-

tending from the city of Atchison via Topeka, the capital of the State of Kansas, to the western line of said State, in the direction of Fort Union and Santa Fe, New Mexico, with a branch from where said road crosses the Neosho (being at present Emporia), in Lyon county, Kansas, down the Neosho valley to a point where the railroad, also aided by said act, extending from the city of Leavenworth *via* the town of Lawrence to the south line of the State, in the direction of Galveston bay, in Texas, enters the Neosho valley, and that the route of said branch line of railway down the Neosho valley was substantially the route covered by the charter of your petitioner.

The said act of Congress of March 3, 1863, among other things, provided in section 3 thereof that the railroads and branches for whose benefit lands were thereby granted should be and remain public highways for the use of the United States, free from all toll or other charge for the transportation of the property and troops of the United States, and by section 5 thereof it was provided that the United States mails should be transported over said roads and branches, under the direction of the Post-Office Department, at such price as Congress might by law direct, and until such price should be fixed by law the Postmaster General should have the power to determine the same. Said act of Congress of March 3, 1863, did not specify the railway companies which should have the benefit of the lands thereby granted.

Your petitioner further shows that on February 9, 1864, the legislature of the State of Kansas, by an act entitled "*An act to accept the grant of lands made to the State of Kansas by the Congress of the United States to aid in the construction of said railroads and telegraphs*," duly accepted the grant of lands made by said act of Congress of March 3, 1863, upon the terms and conditions therein set forth. By section 5 of said act of the legislature of Kansas of February 9, 1864, the State of Kansas agreed to grant, bargain, and sell to the Atchison, Topeka and Santa Fe Railway Com-

pany, a corporation organized and existing under the laws of Kansas, by special act of the legislature of the Territory of Kansas of February 11, 1859, all that portion of the lands granted to the State of Kansas by said act of 1863, for the said railroad hereinbefore described, running from Atchison via Topeka to the west line of the State of Kansas, with a branch down the Neosho valley, in consideration that the said Atchison, Topeka and Santa Fe Railway Company should build said lines of railway, and upon the agreement between the State of Kansas and the said Atchison Company that said lands should be subject to the conditions, reservations, and provisions set forth in said act of Congress of 1863, and upon the further condition that the Congress of the United States should before the 4th day of March, 1866, consent to the extension of the Neosho Valley Branch of the railroad so as to intersect the Union Pacific Railway, Eastern Division, at or near Fort Riley (now Junction City), Kansas, and should make a grant of land for such extension of like amount per mile with that granted for the construction of the principal road, and that the Atchison Company should proceed to construct such branch to such intersection on the conditions provided in said act of the legislature of Kansas. Said last-mentioned act of the State of Kansas also provided that the Atchison Company should file its acceptance of said act within six months after the passage thereof. The Atchison Company, within the time prescribed, duly accepted said act and built its railroad across said State of Kansas from the east to the west, but did not build the said Neosho Valley Branch, which, however, was subsequently built by your petitioner, as will herein more fully appear.

Your petitioner further shows that on July 2, 1864, the Congress of the United States passed an act entitled "*An act making additional grant of lands to the State of Kansas to aid in the construction of railway and telegraph lines,*" whereby the United States granted to the State of Kansas, to aid in the construction of a railway and telegraph line

from Emporia, by way of Council Grove, to a point near Fort Riley (now Junction City), Kansas, on the Union Pacific Railway, certain lands as contemplated by said act of the legislature of Kansas of February 9, 1864, subject to all the provisions, restrictions, limitations, and conditions of said act of Congress of 1863. Said act of Congress of 1864 also provided that the railway to be constructed under the terms of said act should be a public highway and should transport the troops and munitions of war of the United States free of charge on that part of the line where the company received its land grant.

Your petitioner further shows that on the 19th of March, 1866, the said Atchison, Topeka and Santa Fe Railway Company and your petitioner entered into a certain agreement in writing whereby the Atchison Company assigned all of its rights in and to the lands granted by said act of Congress of March 3, 1863, and of July 1, 1864, as to the line of railway from Fort Riley down the Neosho valley, and known as the Neosho Valley Branch, to your petitioner in consideration of your petitioner agreeing to build the line of railroad from Fort Riley down the Neosho valley; and your petitioner further shows that the State of Kansas, by a resolution of its legislature duly approved by its Governor, dated February 26, 1867, fully ratified and confirmed said assignment of the Atchison, Topeka and Santa Fe Railway Company to your petitioner, as the said State of Kansas had the lawful power and right to do, and the said assignment has always been respected by said companies and by said State of Kansas and fully recognized by the United States in adjusting the land grants of said companies, and has been repeatedly confirmed as legal and binding in the courts of the United States.

Your petitioner further states that on July 25, 1866, the Congress of the United States passed the following act:

"*An Act Granting Lands to the State of Kansas to Aid in the Construction of the Kansas and Neosho Valley Railroad and its Extension to Red River.*

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That for the purpose of aiding the Kansas and Neosho Valley Railroad Company, the same being a corporation organized under the laws of the State of Kansas, to construct and operate a railroad from the eastern terminus of the Union Pacific Railroad, Eastern Division, at the line between Kansas and Missouri, at or near the mouth of the Kansas river, on the south side thereof, southwardly, through the eastern tier of counties in Kansas, with a view of its extension, so as to effect a junction at Red river with a railroad now being constructed from Galveston to Red river at or near Preston, in Texas, there is hereby granted to the State of Kansas, for the use and benefit of said Railroad Company, every alternate section of land or parts thereof, designated by odd numbers, to the extent of ten sections per mile on each side of said road, to be selected within twenty miles from (of) the line of said road; but in case it shall appear that the United States have, when the line of said road is definitely located, sold any section, or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid, from the public lands of the United States nearest to the sections above specified, so much land as shall be equal to the amount of such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached as aforesaid, which lands, thus indicated by the direction of the Secretary of the Interior, shall be reserved and held for the State of Kansas for the use of said company by the said Secretary for the purpose of the construction and operation of said railroad, as provided by this act: *Provided*,

That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby, reserved and excepted from the operation of this act, except so far as it may be found necessary to locate the route of said road through such reserved lands, in which case the right of way two hundred feet in width is hereby granted, subject to the approval of the President of the United States: *And provided, further,* That none of the lands hereby granted shall be selected beyond twenty miles from the said road.

"SEC. 2. *And be it further enacted,* That the sections and parts of sections of land which by the aforesaid grant shall remain in the United States, within ten miles on each side of said road, shall not be sold for less than double the minimum price of public lands when sold, nor shall any of said lands become subject to sale at private entry until the same shall have been first offered at public sale to the highest bidder, at or above the minimum price aforesaid: *Provided,* That actual *bona fide* settlers under the pre-emption laws of the United States may, after due proof of settlement, improvement, and occupation, as now provided by law, purchase the same at the price fixed for said lands at the date of such settlement, improvement, and occupation: *And provided also,* That settlers under the provisions of the homestead act, who make their settlement after the passage of this act, and comply with the terms and requirements of said act, shall be entitled, within the said limits of ten miles, to patents for an amount not exceeding eighty acres each.

"SEC. 3. *And be it further enacted,* That the grant of lands hereby made is upon condition that said company, after the construction of its road, shall keep it in repair and use and that (it will) at all times be in readiness to transport troops, munitions of war, supplies and public stores upon its road for the Government, when required to do so by any department thereof, at the cost, charge, and expense of said company. And the lands hereby granted, held,

and reserved as aforesaid shall inure to the benefit of said company, as follows: When the Governor of the State of Kansas shall certify that any section of ten consecutive miles of said road is completed in a good, substantial, and workmanlike manner as a first-class railroad, then the said Secretary of the Interior shall issue to the said company patents for so many sections of the lands within the limits above named as are coterminous with said completed section hereinbefore granted; and when certificates of the Governor aforesaid shall be presented to said Secretary, of the completion, as aforesaid, of each successive section of ten consecutive miles of said road, the said Secretary shall in like manner issue to said company patents for the land for each of said sections of road as in the first instance, until said road shall be completed: *Provided,* That, if said road is not completed within ten years from the date of the acceptance of the grant hereinbefore made, the lands remaining unpatented shall revert to the United States: *And provided further,* That the said lands shall not, in any manner, be disposed of or incumbered by said company or its assigns, except as the same are patented under the provisions of this act.

"SEC. 4. *And be it further enacted,* That as soon as said company shall file with the Secretary of the Interior maps of its line, designating the route thereof, it shall be the duty of the said Secretary to withdraw from the market the lands granted by this act, in such manner as may be best calculated to effect the purposes of this act and subserve the public interest.

"SEC. 5. *And be it further enacted,* That the United States mail shall be transported on said road and its extension, under the direction of the Post-Office Department, at such price as Congress may by law provide: *Provided,* That until such price is fixed by law, the Postmaster General shall have power to fix the compensation.

"SEC. 6. *And be it further enacted,* That the right of way through the public lands be, and the same is hereby, granted to the said Kansas and Neosho Valley Railroad Company, its successors and assigns, for

the construction of a railroad as proposed; and the right is hereby given to said corporation to take from the public lands adjacent to the line of said road material for the construction thereof. Said way is granted to said railroad to the extent of one hundred feet in width on each side of said road, where it may pass through the public domain; also all necessary ground for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables and water stations.

"SEC. 7. *And be it further enacted*, That the acceptance of the terms, conditions, and impositions of this act by the said Kansas and Neosho Valley Railroad Company shall be signified in writing, under the corporate seal of the said company, duly executed pursuant to the direction of its board of directors first had and obtained, which acceptance shall be made within one year after the passage of this act, and not afterwards, and shall be deposited with the Secretary of the Interior.

"SEC. 8. *And be it further enacted*, That said Kansas and Neosho Valley Railroad Company, its successors and assigns, is hereby authorized and empowered to extend and construct its railroad from the southern boundary of Kansas south, through the Indian Territory, to Red river, at or near Preston, in the State of Texas, so as to connect with the railway now being constructed from Galveston to a point at or near Preston, in said State, and the right of way through the Indian Territory, wherever such right is now reserved or may hereafter be reserved to the United States by treaty with the Indian tribes, is hereby granted to said company, to the same extent as granted by the sixth section of this act, through the public lands; and in all cases where the right of way, as aforesaid, through the Indian lands shall not be reserved to the Government, the said company shall, before constructing its road, procure the consent of the tribe or tribes interested, which consent, with all its terms and conditions, shall be previously approved and endorsed by the President and filed with the Secretary of the Interior.

"SEC. 9. *And be it further enacted*, That the same

grants of lands through the Indian Territory are hereby made as provided in the first section of this act, whenever the Indian title shall be extinguished by treaty or otherwise, not to exceed the ratio per mile granted in the first section of this act: *Provided,* That said lands become a part of the public lands of the United States.

"SEC. 10. *And be it further enacted,* That said Kansas and Neosho Valley Railroad Company, its successors and assigns, shall have the right to negotiate with, and acquire from any Indian nation or tribe, authorized by the United States to dispose of lands for railroad purposes, and from any other nation or tribe of Indians through whose lands said railroad may pass, subject to the approval of the President of the United States, or from any company or parties incorporated or authorized for such purposes, by such nation or tribe, or which such parties may have acquired under the laws of the United States.

"SEC. 11. *And be it further enacted,* That any railroad company chartered under any law of the United States, or of the State of Kansas, which may have been heretofore or shall hereafter be recognized and subsidized by any act of the Congress of the United States, may connect, unite, and consolidate with this railroad company, after the same shall be located to the valley of the Neosho river, upon just, fair, and equitable terms, to be agreed upon between the parties, and shall not be against the public interest or the interest of the United States; nor shall any road authorized to connect as aforesaid charge the road so connecting a greater tariff per mile for freight or passengers than is charged for the same per mile by its own road: *And provided further,* That should the Leavenworth, Lawrence and Fort Gibson Railroad Company, or the Union Pacific Railroad Company, Southern Branch, construct and complete its road to that point on the southern boundary of the State of Kansas where the line of said Kansas and Neosho Valley Railroad shall cross the same, before the said Kansas and Neosho Valley Railroad Company shall have constructed and completed its said

road to said point, then and in that event the company so first reaching in completion the said point on the southern boundary of the State of Kansas shall be authorized, upon obtaining the written approval of the President of the United States, to construct and operate its line of railroad from said point to a point at or near Preston, in the State of Texas, with grants of land according to the provisions of this act, but upon the further special condition, nevertheless, that said railroad company shall have commenced in good faith the construction thereof before the said Kansas and Neosho Valley Railroad Company shall have completed its said railroad to said point: *And provided further*, That said other railroad company, so having commenced said work in good faith, shall continue to prosecute the same with sufficient energy to insure the completion of the same within a reasonable time, subject to the approval of the President of the United States: *And provided further*, That the right of way through private property, when not otherwise provided for in this act, or by the law of any State through which the road may pass, shall be obtained by said Kansas and Neosho Valley Railroad Company, or either of the other companies named in this act, in accordance with the provisions of section three of an act to amend an act entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the Government the use of the same for postal, military and other purposes,' approved July first, eighteen hundred and sixty-two."

Your petitioner shows that said act of Congress of July 25, 1866, was duly accepted by your petitioner, and its railroad, as herein shown, built across the Indian Territory from north to south in conformity to and in compliance therewith.

Your petitioner further shows that section 3 of said act of Congress of July 2, 1864, referred to in the 11th section of said act of Congress of July 25, 1866, and which said act of July 2, 1864, is entitled "*An act to amend an act entitled*

'An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the Government the use of same for postal, military and other purposes, approved July 1, 1862,'" provides a comprehensive mode of procedure for the exercise of the power of eminent domain on the part of the railway company, and empowers the railway company to enter upon, purchase, take, or hold any lands or premises that might be necessary and proper for the construction and working of its road, not exceeding in width 100 feet on each side of its said line, unless a greater width be required for the purposes of excavation or embankment, and also any lands or premises which might be necessary for turnouts, standing places for cars, depots, station-houses, or any other structure required in the construction and operation of its road.

Your petitioner further shows that on July 26, 1866, the Congress of the United States passed the following act:

> *"An Act Granting Lands to the State of Kansas to Aid in the Construction of a Southern Branch of the Union Pacific Railway and Telegraph from Fort Riley, Kansas, to Fort Smith, Arkansas.*
>
> *"Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled,* That for the purpose of aiding the Union Pacific Railroad Company, Southern Branch, the same being a corporation organized under the laws of the State of Kansas to construct and operate a railroad from Fort Riley, Kansas, or near said military reservation, thence down the valley of the Neosho river to the southern line of the State of Kansas, with a view to an extension of the same through a portion of the Indian Territory to Fort Smith, Arkansas, there is hereby granted to the State of Kansas, for the use and benefit of said railroad company every alternate section of land or parts thereof designated by odd numbers, to the extent of five alternate sections per mile on each side of said road, and

not exceeding in all ten sections per mile; but, in case it shall appear that the United States have, when the line of said road is definitely located, sold any section, or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid, from the public lands of the United States nearest to the sections above specified, so much land as shall be equal to the amount of such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached as aforesaid, which lands, thus indicated by the direction of the Secretary of the Interior, shall be reserved and held for the State of Kansas for the use of said company by the said Secretary, for the purpose of the construction and operation of said railroad, as provided by this act: *Provided*, That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby, reserved and excepted from the operation of this act, except so far as it may be found necessary to locate the route of said road through such reserved lands, in which case the right of way, two hundred feet in width, is hereby granted, subject to the approval of the President of the United States: *And provided, further*, That said lands hereby granted shall not be selected beyond twenty miles from the line of said road.

"SEC. 2. *And be it further enacted*, That the sections and parts of sections of land which by the aforesaid grant shall remain in the United States, within ten miles on each side of said road, shall not be sold for less than double the minimum price of public lands when sold: *Provided*, That actual *bona fide* settlers under the pre-emption laws of the United States may, after due proof of settlement, improvement, and occupation, as now provided by law, pur-

chase the same at the price fixed for said lands at the date of such settlement, improvement, and occupation: *Provided, also,* That settlers under the provisions of the homestead act, who make their settlement after the passage of this act and comply with the terms and requirements of said act, shall be entitled, within the said limits of ten miles, to patents for an amount not exceeding eighty acres each.

"SEC. 3. *And be it further enacted,* That the grant of lands hereby made is upon condition that said company, after the construction of its road, shall keep it in repair and use, and shall at all times transport troops, munitions of war, supplies, and public stores upon its road for the Government of the United States, free from all cost or charge therefor to the Government, when required to do so by any department thereof. And the lands hereby granted shall inure to the benefit of said company, as follows: When the Governor of the State of Kansas shall certify that any section of ten consecutive miles of said road is completed in a good, substantial, and workmanlike manner, as a first-class railroad, then the said Secretary of the Interior shall issue to the said company patents for so many sections of the land herein granted within the limits above named, and coterminous with said completed section hereinbefore granted; and when certificates of the Governor aforesaid shall be presented to said Secretary of the completion, as aforesaid, of each successive section of ten consecutive miles of said road, the said Secretary shall in like manner issue to said company patents for the land for each of said sections of road as in the first instance, until said road shall be completed: *Provided,* That if said road is not completed within ten years from the date of the acceptance of the grant hereinbefore made, the lands remaining unpatented shall revert to the United States.

"SEC. 4. *And be it further enacted,* That as soon as said company shall file with the Secretary of the Interior, maps of its line, designating the route thereof, it shall be the duty of said Secretary to withdraw from the market the lands granted by this act, in such manner as may be best calculated to effect the pur-

poses of this act and subserve the public interest.

"SEC. 5. *And be it further enacted*, That the United States mail shall be transported on said road, and under the direction of the Post-Office Department, at such price as Congress may by law provide: *Provided*, That until such price is fixed by law the Postmaster General shall have power to fix the compensation.

"SEC. 6. *And be it further enacted*, That the right of way through the public lands be, and the same is hereby, granted to said Pacific Railroad Company, Southern Branch, its successors and assigns, for the construction of a railroad as proposed; and the right is hereby given to said corporation to take from the public lands adjacent to the line of said road material for the construction thereof. Said way is granted to said railroad to the extent of one hundred feet in width on each side of said road where it may pass through the public domain; also all necessary ground for station buildings, work-shops, depots, machine shops, switches, side tracks, turntables and water stations.

"SEC. 7. *And be it further enacted*, That the acceptance of the terms, conditions and impositions of this act by the said Pacific Railroad Company, Southern Branch, shall be signified in writing, under the corporate seal of the said company, duly executed pursuant to the direction of its board of directors first had and obtained, which acceptance shall be made within one year after the passage of this act, and not afterwards, and shall be deposited with the Secretary of the Interior.

"SEC. 8. *And be it further enacted*, That said Pacific Railroad Company, Southern Branch, its successors and assigns, is hereby authorized and empowered to extend and construct its railroad from the southern boundary of Kansas, south through the Indian Territory, with the consent of the Indians, and not otherwise, along the valley of Grand and Arkansas rivers, to Fort Smith, in the State of Arkansas; and the right of way through said Indian Territory is hereby granted to said company, its successors and assigns, to the extent of one hundred feet

on each side of said road or roads, and all necessary ground for stations, buildings, workshops, machine shops, switches, side tracks, turn tables and water stations.

"SEC. 9. *And be it further enacted,* That the same grant(s) of lands through said Indian Territory are hereby made as provided in the first section of this act, whenever the Indian title shall be extinguished by treaty or otherwise, not to exceed the ratio per mile granted in the first section of this act: *Provided,* That said lands become a part of the public lands of the United States.

"SEC. 10. *And be it further enacted,* That said Pacific Railroad Company, Southern Branch, its successors and assigns, shall have the right to negotiate with, and acquire title to land for railroad purposes from, any Indian nation or tribe authorized by the United States to dispose of lands, and from any other nation or tribe of Indians through whose lands said railroad may pass, subject to the approval of the United States, or from any company or parties incorporated or authorized for such purposes, by such nation or tribe, or which such parties may have acquired under the laws of the United States.

"SEC. 11. *And be it further enacted,* That any railroad company chartered under any law of the United States, or of any State which may have been heretofore or shall hereafter be organized by any act of Congress of the United States, may connect, unite, and consolidate with this railroad company, after the same shall be located to the valley of the Neosho or Grand river, upon just, fair, and equitable terms, to be agreed upon between the parties, as shall not be against the public interest, or the interest of the United States."

Your petitioner further shows that by due corporate action it duly accepted the terms, conditions, and impositions of said act of Congress of July 26, 1866, and filed such acceptance with the Department of the Interior within the time in said act prescribed.

Your petitioner further shows that it constructed a line of

railway from Junction City, Kansas, near Fort Riley, Kansas, down the valley of the Neosho river to the southern boundary line of the State of Kansas, a distance of 182 miles, completing the same on June 6, 1870, under and pursuant to its charter powers and under and pursuant to said acts of Congress of March 3, 1863, July 2, 1864, and July 25 and 26, 1866.

Your petitioner further shows that the acts of Congress of the United States granting lands in aid of the construction of a line of railroad from the Missouri river to the Pacific ocean, of July 1, 1862, as amended by the act of July 2, 1864, and the grants to the State of Kansas and your petitioner by said acts of 1863 and 1864, and said acts of July 25 and 26, 1866, herein referred to, were parts of a general scheme and purpose on the part of the United States to provide for the construction and operation of a railroad system down the Neosho valley, and thence through the Indian Territory, connecting Fort Riley, in Kansas, with Fort Gibson, in the Indian Territory, and other forts in the State of Texas, and with other railroads in Texas extending to the Gulf of Mexico and the Republic of Mexico, and said land grant acts of March 3, 1863, and February 9, 1864, so far as they related to the line down the Neosho valley, and the acts of July 25 and 26, 1866, so far as they related to the railroad across the Indian Territory, were all intended for the benefit of your petitioner, and that said land grants have been so administered by the Land Department of the United States, and that the purpose of these land-grant acts was not only the development of the country by providing for it railroad facilities, but to secure to the United States means for the transmission of its mails at prices to be by it fixed and the transportation of its troops and munitions of war across the continent, and from Fort Riley through Kansas to forts in the Indian Territory and in Texas, and thence through Texas to the Gulf of Mexico and the Republic of Mexico.

Your petitioner further shows that in pursuance of said

purposes the United States in negotiating treaties with the Cherokee, Creek, Choctaw, and Chickasaw nations of Indians, which nations were then occupying the Indian Territory, concluded respectively July 19, 1866, June 14, 1866, and April 28, 1866, said nations and each of them granted a right of way to any railroad company which should be authorized by the Congress of the United States to construct a railroad from any point north to any point south through said nations, as well as other valuable rights and privileges (14 U. S. Stat., pp. 799, 785, 769).

Your petitioner shows that by building its railroad from Junction City, Kansas, to the southern boundary line of the State of Kansas at the northern boundary of the Indian Territory, under said acts of Congress of March 3, 1863, July 1, 1864, July 25, 1866, and July 26, 1866, it earned the lands granted to it in the State of Kansas by said acts, and that said acts of March 3, 1863, July 1, 1864, and July 26, 1866, were and have been construed by the Supreme Court of the United States in the case of Kansas City, Lawrence and Southern Kansas R. R. Co. *v.* Attorney General, 118 U. S., 682, to be acts in *pari materia* and constituting one land grant to your petitioner in the State of Kansas. Owing to previous grants and reservations of the lands in *place* and *indemnity limits* within said grants in the State of Kansas, your petitioner only received a part of the full quota of such grants, there being, as finally determined by the Land Department of the United States, a deficiency in said land grants in the State of Kansas of 388,338 acres, which your petitioner never received. The full quota of said land grants in the State of Kansas, covering your petitioner's line in Kansas, would have been about 1,300,000 acres, but, owing to previous grants and reservations, your petitioner only actually received 911,662 acres, more or less.

Your petitioner further shows that by first building its railroad to the southern boundary line of the State of Kansas to the point named in section 11 of the act of July 25, 1866,

it became entitled by said act and under the treaties of the Cherokee, Creek, Choctaw, and Chickasaw nations with the United States, to the exclusive right to extend its railroad across the Indian Territory from north to south, as provided in said acts of July 25, 1866, and July 26, 1866, with grants of lands according to the provisions of said acts. Upon the completion of your petitioner's railroad to the northern boundary line of the Indian Territory, a controversy arose between your petitioner and the Indian nations comprising the Indian Territory and the railroads mentioned in section 11 of the act of July 25, 1866, namely, the Leavenworth, Lawrence and Fort Gibson Railroad Company and the Kansas and Neosho Valley Railroad Company, as to which company had the right, as provided by section 11 of said act of July 25, 1866, to extend across the Indian Territory, according to sections 8 and 11 of said act, and to the grants of land granted by sections 1 and 9 of said act, and this controversy was submitted by the parties thereto to the President of the United States and the Secretary of the Interior.

Your petitioner further shows that on May 21, 1870, the then Secretary of the Interior of the United States, J. B. Cox, to whom such controversy was first submitted, found and reported to the President of the United States that under the legislation aforesaid three railroad companies were authorized to build their lines to a common point on the northern boundary of the Cherokee lands in the Indian Territory, near where the Neosho river crosses said boundary, and that the road which should first succeed in reaching said common point was authorized to build a trunk road through the Indian Territory to a point at or near Preston (now Denison), in the State of Texas, and that but one of such trunk lines from north to south was authorized to be built, and reported to the President of the United States that the line of railway of your petitioner was in substantial accord with the scheme fixed by said acts of Congress and the Indian treaties aforesaid, and recommended the appointment

of a commission to determine which of said railroad companies should first fully comply with the conditions of said acts, and to report when such complete fulfillment shall have taken place, and a commission was accordingly appointed, and the report of said commission and the finding of the Secretary of the Interior thereon were approved by the President of the United States May 23, 1870, and the recommendations of the Secretary of the Interior were directed to be carried out. A copy of said report of the Secretary of the Interior of May 21, 1870, is filed herewith as Exhibit No. 4 (Book of Exhibits, page 20), and your petitioner asks that same may be considered a part of this petition as though fully incorporated herein and at length set out.

Your petitioner further shows that the said commissioners appointed to ascertain which company should first construct its line to the southern boundary line of the State of Kansas made their report, dated June 13, 1870, and among other things found:

> "1st. That the Union Pacific Railway Company, Southern Branch (meaning Missouri, Kansas and Texas Railway Company), reached the northern boundary of the Indian Territory in the valley of the Neosho river on the west side and about one mile therefrom, at 12:00 m. on the 6th day of June, 1870, and that at that time there was no other railroad nearer than sixteen miles of that point.
>
> "2nd. That on the 9th day of June, 1870, Governor James M. Harvey of the State of Kansas, the officer specified by act of Congress to pronounce upon the completion of this railroad, certified over his official seal that the same was a first-class, completed railroad to the northern boundary of the Indian Territory."

Your petitioner further shows that said commissioners further found that the Kansas and Neosho Valley Railroad reached the northern boundary of the Indian Territory on

April 30, 1870, but at a point about fifteen miles east of the Neosho river and upon the borders of the Quapaw reservation, through which no right for any railroad company to enter had been granted.

Your petitioner further shows that Governor James M. Harvey, of the State of Kansas, as provided by said acts of Congress of July 25 and 26, 1866, certified on June 9, 1870, that on the 6th day of June, 1870, the railroad of your petitioner was completed to the southern boundary of the State of Kansas, and on the 7th and 8th days of June, 1870, he passed over the same and made a careful and critical examination of its construction and equipment and found the same to be a first-class railroad.

Your petitioner shows that another hearing was had before the Secretary of the Interior by the railroad companies contending for the right to construct a line of railway through the Indian Territory and the rights and lands granted by said act of Congress of July 25, 1866, and in such rehearing the Secretary of the Interior determined that the certificates of the Governor of Kansas as to the completion of the Missouri, Kansas and Texas Railway to the northern boundary of the Indian Territory was, under said acts, conclusive evidence of that fact, and recommended to the President of the United States that authority be given your petitioner, in accordance with the terms of the 11th section of the act of July 25, 1866, to construct and operate its line of railway from said point upon the northern boundary of the Indian Territory to a point at or near Preston (now Denison), Texas, subject to such conditions as to the mode of construction and completion as would make it fit and sufficient as a trunk road for the commerce of all branches, north and south, which might be expected to move over it, and that under said acts of Congress the President's approval was requisite to the construction of said line of railroad through the Indian Territory, and that the President was authorized to prescribe such reasonable mode of construction

and completion as should fit such trunk road for all of the purposes for which it was intended, and recommended that the President should prescribe that said trunk road should be made upon the easiest grades and curves which were practicable; that its road-bed be raised above the reach of floods and be thoroughly drained, and that its bridges and culverts be of solid, durable, and approved construction, with not less than 2,700 ties of hardwood per mile, and rails of 56 pounds weight, thoroughly coupled by fish joints, and the road throughout ballasted with stone or gravel and fully furnished with side tracks, water and fuel stations, and rolling stock up to the standard required by railways, to the Pacific ocean, before the same should be accepted, and that a commission of three competent persons be appointed, whose certificate should be required "in similar manner, who should be paid by said company at the same rate as was done in the case of the Union Pacific Railroad to the Pacific ocean," and that the company also be required to give a bond for a reasonable amount, payable to the United States, conditioned that your petitioner should, in every particular, respect the rights of the Indian tribes and the individuals thereof, as guaranteed by the treaties and the intercourse and other statutes of the United States.

Your petitioner files herewith a copy of said findings and reports of the Secretary of the Interior to the President, including therein the report of said commission, dated June 13, 1870, and the approval thereof of the President of the United States on July 20, 1870, as Exhibit No. 5 (Book of Exhibits, page 39), and asks that the same be considered a part of this petition in like manner as though incorporated herein and at length set forth.

Your petitioner further shows that on the 22d day of July, 1870, the Secretary of the Interior formally notified your petitioner that it had, by complying with the conditions precedent, acquired the right to construct its line of railroad through the Indian Territory, prescribing therein specifica-

tions for its construction and requiring said railway company to give a bond in a reasonable sum, payable to the United States or to either of the Indian nations, and authorizing your petitioner, upon the filing of a map of its road and the required bond, to proceed with the construction of its railroad through the Indian Territory. A copy of said notification is herewith filed as Exhibit No. 6 (Book of Exhibits, page 48), and your petitioner asks that the same be considered a part of this petition in like manner as though it was incorporated herein and at length set out.

Your petitioner further shows that it duly executed and delivered the bond, as required, and also filed with the Department of the Interior maps of definite location of its line of railroad through the Indian Territory, and immediately began the construction of its line of railway through the Indian Territory as thus definitely located, and constructed and completed the same as required by said acts of Congress, and especially said act of Congress of July 25, 1866, and also fully complied with the specifications, rules, and regulations which the President and the Secretary of the Interior of the United States so prescribed, as aforesaid. Your petitioner files herewith a copy of said bond, marked Exhibit No. 9 (Book of Exhibits, page 78), and refers to certified copies of said maps of definite location on file with the Secretary of the Interior and asks that the same be considered a part of this petition in like manner as if incorporated herein and at length set out.

Your petitioner further shows that thereafter the President of the United States appointed commissioners to examine the line of railway of your petitioner as constructed, extending from the southern boundary line of Kansas to the Arkansas river, which said commission examined said railway between the points aforesaid and found that the same had, in all particulars been constructed and completed as required by said act of Congress of July 25, 1866, and the regulations and specifications of the Secretary of the

Interior, and recommended the acceptance of said railway by the Department of the Interior, and on May 12, 1872, the Secretary of the Interior transmitted said report of said commission to the President of the United States and recommended the acceptance of said railway and telegraph line, and thereafter, on the 17th day of May, 1872, the President of the United States approved the recommendations of the said commission and the Secretary of the Interior and directed that they be carried into effect. Your petitioner files herewith as Exhibit No. 7 (Book of Exhibits, page 51) a copy of the report of said commission, dated December 21, 1871, the approval thereof by the Secretary of the Interior, and his recommendation that said section of the line of railway of your petitioner be accepted, dated May 12, 1872, as well as a copy of the approval by the President of the United States of the recommendations of the Secretary of the Interior and his directions that same be carried into effect, dated May 17, 1872, and your petitioner asks that same be considered a part of this petition with like effect as though same were incorporated herein and at length set out.

Your petitioner further shows that thereafter, on the 10th day of December, 1872, the President appointed commissioners to examine that part of the railway of your petitioner extending from the Arkansas river to the Red river, near Denison, Texas, and that on the 13th day of January, 1873, said commissioners made their report, finding that that section of the railway of your petitioner had been constructed according to the provisions of the acts of Congress of July 25 and 26, 1866, and the regulations and specifications of the Department of the Interior, and on March 10, 1873, the Secretary of the Department of the Interior transmitted said report to the President and recommended the acceptance of said section of your petitioner's railway; and on the 11th day of March, 1873, the President of the United States approved the recommendations of the Secretary of the Interior and accepted said section of your petitioner's railway. Copies of

the report of said commission, dated January 13, 1873, and recommendation of the Secretary of the Interior that same be approved, dated March 10, 1873, and the acceptance by the President of the United States of said section of your petitioner's railway, dated March 11, 1873, are herewith filed as Exhibit No. 8 (Book of Exhibits, page 62), and your petitioner asks that the same be considered a part of its petition with like effect as though the same were incorporated herein and at length set out.

Your petitioner shows that in the annual report of the board of directors of your petitioner to its stockholders, printed by order of the board on March 31, 1871, after the railroad of your petitioner had been completed from Junction City, Kansas, to the southern line of the State of Kansas at the northern boundary of the Indian Territory, and after it had been determined by the Secretary of the Interior that your petitioner was the railroad company that had the right to extend its railroad through the Indian Territory to Texas, and after your petitioner's railroad had been definitely located through the Indian Territory and a map of such location duly certified and filed with the Secretary of the Interior, and was undergoing construction, among other things it was stated:

> "The Missouri, Kansas and Texas Railroad Company own and control the following described lines of road, viz:
>
> "*Neosho Division.*—Starting from Junction City on the line of the Kansas Pacific Railway, and traversing the State of Kansas in a southeasterly direction to the north boundary of the Indian Territory, a distance of 182 miles.
>
> "*Sedalia Division.*—Starting from Sedalia, in Pettis county, Missouri, the most important station on the line of the Missouri Pacific Railroad, and running in a southwesterly direction through Clinton, Nevada, and Fort Scott, to a junction with the Neosho Division, at the town of Parsons, a distance of 160 miles.

"From the southern line of Kansas, an extension is in course of construction through the Indian Territory to Preston, on the Red river, the Texas frontier. The whole of this portion of the line has been surveyed and ninety miles of grading are finished, the iron for the same is already on the ground, and the road will be completed to Fort Gibson by the first of May.

"This is the only line authorized through the Indian Territory to Texas by the Government of the United States.

"A first-class line of stages connects the terminus of the railway with the Houston & Texas Central Railroad.

"From Preston on the Red river, it is designed, and an act of the legislature of Texas expressly confers upon the Missouri, Kansas and Texas Railroad Company, the necessary powers and privileges * * * to extend its line through the heart of the magnificent State of Texas, in a southwesterly direction to the city of Austin, and thence to the Rio Grande, at or near Camargo.

"This line will open up a country of which it has been said, it could sustain a population almost equal to that of France.

"NORTHERN CONNECTIONS.

"The northern connections of the Missouri, Kansas and Texas Railway are extensive and important.

"At Sedalia, it strikes the Missouri Pacific Road, running easterly into St. Louis, and thus connects with the vast net-work of railroads spreading from that great railroad center to the Atlantic seaboard.

"It likewise connects at Sedalia with the Chicago and Alton Road, via the Louisiana and Jacksonville Road, and with the Toledo and Wabash and Lake Shore Railroads, via the new line from Sedalia to Moberly Junction on the North Missouri Road. At Moberly Junction it also connects with Ottumwa, on the Des Moines Valley Line, which traverses the best portion of the State of Iowa.

"At Junction City the Neosho Division connects with the Kansas Pacific Railway (now Union Pacific

Railroad), running northwesterly to Denver, Colorado, there connecting, via Denver Pacific Railroad, with the Union Pacific Railway, thus forming an all-rail route through to California."

* * * * * * *

"The lands (meaning those granted by the United States) of the company consist of 1,300,000 acres in Kansas, and 3,100,000 acres in the Indian Territory, the latter subject to the Indian occupancy, until that shall be extinguished, which will not be long delayed."

In said printed annual report of 1871 to the stockholders it was further stated:

"Indian Territory Extension.

"This extension of the Missouri, Kansas and Texas Railroad Company carries the road from the southern boundary line of Kansas across the Indian Territory to Preston, on the northern boundary line of the State of Texas. The route as surveyed crosses the territory occupied by the Cherokee, Creek, Choctaw and Chickasaw tribes of Indians.

"By an act of Congress approved July 25, 1866, there was granted to the State of Kansas, for the purpose of aiding the Kansas and Neosho Valley Railroad Company, ten sections per mile on each side of said road. This company was incorporated by Kansas to construct and operate a railroad from at or near the mouth of the Kansas river, on the boundary line between the States of Kansas and Missouri, southwardly through the eastern tier of counties in Kansas, with a view to its extension through the Indian Territory to the Red river, at or near Preston.

"By the 9th section of that act, grants of land in the same ratio, viz., ten sections per mile on each side through the Indian Territory, were made for the benefit of said company, subject to the extinguishment of the Indian title.

"By the 11th section of that act, it was provided that one of the three railroad companies, viz., the said Kansas and Neosho Valley Railway Company, the Leavenworth, Lawrence and Fort Gibson Railway Company, and the Union Pacific Railway Company, Southern Branch, which should first complete its road to the designated point on the southern boundary of Kansas should, upon obtaining the written approval of the President of the United States, be authorized to construct and operate its line of railroad from said point across the Indian Territory to Preston.

"The question, which one of these railroad companies had complied with this provision and had thus become entitled to extend its road, came before the Department of the Interior at Washington in May, 1870.

"The Secretary decided that the Union Pacific Railway Company, Southern Branch, had complied with the condition, and had become entitled to construct their railroad through the Indian Territory to Preston.

"The Secretary further decided that it was the intent and meaning of the act of Congress, construed in connection with the Indian treaties, that but one road should be constructed through the Indian Territory from north to south. The Missouri, Kansas and Texas Company thus acquired an *exclusive* right. The views and findings of the Secretary were approved by the President, and ordered to be carried into execution."

Attached to said printed report was a map published by C. M. and C. B. Colton & Company, of New York, copyrighted in the year 1871, showing the lines of your petitioner's railroad, acquired and then contemplated to be acquired, in Kansas, Missouri, the Indian Territory, and Texas, and the land grants to your petitioner in Kansas and the Indian Territory, with the twenty-mile limits thereof, granted by the acts of Congress of March 3, 1863, July 1, 1864, July 25, 1866, and July 26, 1866. A correct copy of said map is herewith attached, marked Exhibit "B," and

made a part hereof. Your petitioner states that each and all of the statements contained in said report and the showing made upon said map correctly represent the facts as they then existed and the expectations of your petitioner and its officers, stockholders, and promoters. Your petitioner's railroad across the Indian Territory was completed in 1873, and has been in operation ever since. Your petitioner subsequently, between the years 1873 and 1891, acquired or built railroads in the State of Texas, under the act of May 2, 1870, *supra*, and a controversy having arisen between your petitioner and the State of Texas as to its rights within the State of Texas under an act of the legislature of Texas popularly known as the Compromise legislative act of Texas and entitled

> "An act to authorize the sale and conveyance of the Missouri, Kansas and Texas Railway Company's lines of railroad and properties within this State and certain lines of railroad heretofore operated by or as the property of the Missouri, Kansas and Texas Railway Company or as a part of the system of roads within the State known as the Missouri, Kansas and Texas Railway, and to provide for and authorize the sale, transfer and conveyance of said lines of railroad to, and the purchase and operation thereof by a single corporation, company or association of persons to be incorporated under the laws of this State, and to settle and dispose of certain pending suits, brought by the State of Texas against said Missouri, Kansas and Texas Railway Company, wherein the powers, privileges and franchises granted it within the State are sought to be forfeited,"

your petitioner conveyed all of its railroad lines in Texas to The Missouri, Kansas and Texas Railway Company of Texas, which has ever since owned and operated the Texas lines and the extensions and prolongations thereof as part of its railroads. The Colton map, Exhibit B, hereto attached, shows the condition of the Missouri, Kansas and Texas Rail-

way System as it was partially constructed and contemplated in 1871, and the map, Exhibit A, hereto attached, shows the existing Missouri, Kansas and Texas Railway System.

Your petitioner further shows that under and by virtue of the propositions and covenants contained in said act of the Congress of the United States of July 25, 1866, to your petitioner, and by reason of the acceptance thereof by your petitioner and the performance on the part of your petitioner of the conditions contained in said act, as herein and at length set forth, the United States covenanted to and with your petitioner that it would, and by said act of July 25, 1866, did, grant and convey to your petitioner the fee-simple title to every alternate section of land or parts thereof, designated by odd numbers, to the extent of ten sections per mile on each side of the railway of your petitioner through the Indian Territory, within twenty miles of and from the same, subject only to the Indian title of occupancy until the same should be extinguished—that is, to such communal, possessory, and usufructuary rights therein and thereto as then existed in the Cherokee, Creek, Choctaw, and Chickasaw nations or tribes of Indians. Your petitioner further avers that, as herein shown, said Indian title has been extinguished.

Your petitioner further shows that since the construction of its line of railway through the Indian Territory all of the lands in the Indian Territory, including those within twenty miles on each side of your petitioner's line of railway, have been surveyed by the United States at its expense, under general laws of the United States, as will herein fully appear. Your petitioner files herewith as Exhibit No. 43 (Book of Exhibits, page 591 *et seq.*) a detailed description, by township, range, and section, of every alternate section of land or parts thereof, designated by odd numbers, to the extent of ten sections per mile on each side of your petitioner's line of railway through the Indian Territory and within twenty miles thereof, showing an aggregate acreage of 3,064,390 acres, of

4,788 sections, and of 133 townships, and asks that the same be considered a part of this petition as though incorporated herein and at length set forth.

Your petitioner further shows that at the time of the grant of said sections to your petitioner, as aforesaid, the United States was the owner thereof in fee simple, by and under a treaty between the President of the United States and the First Consul of the French Republic, in the name of the French people, dated April 3, 1803, wherein and whereby the French Republic, by and through its First Consul, ceded said lands to the United States. A copy of said treaty is filed herewith as Exhibit No. 1 (Book of Exhibits, page 1), and your petitioner asks that the same be considered a part of this petition with like effect as though the same was incorporated herein and at length set forth.

Your petitioner further shows that in the administration of the land grants made by the United States to the State of Kansas under the acts of Congress of March 3, 1863, February 9, 1864, and July 26, 1866, and other acts herein referred to, wherein lands were granted for the benefit of railway companies in consideration of the construction of their railways, the grants of lands in place have at all times been held to be grants *in præsenti*, conveying the fee-simple title as and from the date thereof, upon the definite location of the lines of railway and the survey of the lands, and such construction of said grants has been uniformly upheld by the courts of the United States, and so your petitioner claims and avers that the grant of lands through the Indian Territory by virtue of the grants contained in said act of Congress of July 25, 1866, were understood to be and were grants *in præsenti* to your petitioner of the fee-simple title to the odd-numbered sections set forth in said Exhibit No. 43 (Book of Exhibits, page 591 *et seq.*), and being every alternate section of land or parts thereof, designated by odd numbers, to the extent of ten sections per mile on each side of your petitioner's line of railway through the Indian Terri-

tory within twenty miles thereof, subject only, as aforesaid, to the Indian title.

Your petitioner further shows that from the date of the construction and completion of its railway through the Indian Territory it has continuously maintained and operated same in accordance with said acts of Congress and is now operating the same as therein provided and required, and has at all times stood ready to comply with all the terms and provisions of said acts.

Your petitioner claims that by the construction, completion, maintenance, and operation of its railroad through the Indian Territory, as herein shown, it became entitled, under the covenants of the grants of the act of Congress of July 25, 1866, to the possession, use, enjoyment, and title of all of the odd-numbered sections within the twenty-mile limits of its railroad across the Indian Territory, to the extent of ten sections per mile on each side of said railroad, whenever the Indian title as the same existed at the date of said grants was extinguished by treaty or otherwise; and such title of your petitioner to the granted lands by relation took effect from the date of the land-grant act of July 25, 1866, or, at all events, from the date of the extinguishment of such Indian title, and upon the extinguishment of the Indian title your petitioner was entitled to have the lands certified and patented to it by the United States.

Your petitioner further states that, notwithstanding its rights to the lands granted, the United States, through Congress and the action of its executive departments, including the Secretary of the Interior and the Commission to the Five Civilized Tribes and various townsite commissions, has extinguished the Indian title to said lands by treaties with the Indian nations and otherwise, by patenting or deeding the lands to individual allottees, to purchasers of townsite lots, and to others, and in other ways, as herein shown.

Your petitioner further shows that on July 4, 1884, the Congress of the United States passed an act entitled "*An act*

making appropriation for the current contingent expenses of the Indian Department, and for the fulfillment of treaty stipulations with various Indian tribes, for the year ending June 30th, 1885, and for other purposes" (23 Stat. at L., 76), wherein and whereby it is provided that Indians located on public lands might avail themselves of the provisions of the homestead laws as fully and to the same extent as might be done by citizens of the United States.

Your petitioner further says that on February 8, 1887, the Congress of the United States passed an act entitled "*An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and of Territories over the Indians, and for other purposes*" (24 Stat., 388), which act provided a general scheme for the allotment of lands to Indians; but said act did not extend to the allotment of lands occupied by the Cherokee, Creeks, Choctaws, and Chickasaws. And said act further provided that any Indian born within the territorial limits of the United States, to whom allotments should be made, and every Indian born within the territorial limits of the United States, "who has voluntarily taken up within said limits his residence separate and apart from any tribe of Indians therein, is declared to be a citizen of the United States."

Your petitioner further says that on March 1, 1889, the Congress of the United States passed an act entitled "*An act to establish a United States court in the Indian Territory, and for other purposes*" (25 Stat., 783), which established a United States court in the Indian Territory and defines certain crimes and misdemeanors and prescribes punishments therefor.

Your petitioner further states that on March 1, 1889, the Congress of the United States passed an act accepting the articles of cession by the Muskogee or Creek nation or tribe of Indians of the entire western half of the domain of the said nation lying west of the division line surveyed and es-

tablished under the treaty of 1866, and provided that said lands should become a part of the public domain of the United States and be disposed of according to the laws regulating homestead entries.

Your petitioner further shows that in substantially the same manner the entire western half of the lands assigned to the Cherokee, Choctaw, and Chickasaw tribes or nations of Indians for their occupancy was afterwards opened up to settlement and disposed of under the general homestead and land laws of the United States and now constitutes a part of the Territory of Oklahoma.

Your petitioner further states that on May 2, 1890, the Congress of the United States passed an act entitled *"An act to provide a temporary government for the Territory of Oklahoma, and enlarging the jurisdiction of the United States court in the Indian Territory, and for other purposes"* (26 Stat., 81), which act divided the Indian Territory, as the same then existed, by establishing the Territory of Oklahoma out of the western portion thereof, and as therein defined, and extended over said Oklahoma Territory a body of civil and criminal laws, being substantially the civil and criminal laws of the State of Nebraska, and by Section 29 of said act the remaining part of the Indian Territory, to be thereafter known as the Indian Territory, is specifically defined, and a body of civil and criminal laws was established therein for enforcement in the United States court as theretofore established, such civil and criminal laws being substantially the civil and criminal laws of Arkansas as then in force; and by said act the Constitution of the United States, and all general laws of the United States which prohibit crimes and misdemeanors, and all laws relating to national banks, were made effective in the Indian Territory as elsewhere in the United States, and by section 43 of said act it is provided that any member of any Indian tribe residing in the Territory might apply to the United

States court therein for naturalization and be naturalized as a citizen of the United States.

Your petitioner further states that by an act of Congress of February 28, 1891 (26 Stat., 894), it is provided that any Indian entitled to allotment under any existing law may make settlement upon any surveyed or unsurveyed lands of the United States, and upon application to the local land office have the same allotted to him.

Your petitioner further states that by an act of Congress of March 3, 1891, appeals from the United States court in the Indian Territory to the United States Circuit Court of Appeals for the 8th Circuit were provided for.

Your petitioner further states that by section 16 of the act of Congress of March 3, 1893, it was provided that—

> "The President shall nominate and, by and with the advice and consent of the Senate, shall appoint three commissioners to enter into negotiations with the Cherokee nation, the Choctaw nation, the Chickasaw nation, the Muscogee (or Creek) nation, the Seminole nation, for the purpose of extinguishment of the national or tribal title to any lands within that territory now held by any and all of such nations or tribes, either by cession of the same or some part thereof to the United States, or by the allotment and division of the same in severalty among the Indians of such nations or tribes, respectively, as may be entitled to the same, or by such other method as may be agreed upon between the several nations and tribes aforesaid, or each of them, with the United States, with a view to such an adjustment, upon the basis of justice and equity, as may, with the consent of such nations or tribes of Indians, so far as may be necessary, be requisite and suitable to enable the ultimate creation of a State or States of the Union which shall embrace the lands within said Indian Territory."

And said section further authorized and directed said commission to have all of said lands surveyed.

Your petitioner further states that by section 15 of the same act the consent of the United States was given to the allotment of the lands of the Cherokees, Creeks, Choctaws, Chickasaws, and Seminoles, provided that upon such allotments being made the individual Indians should be deemed in all respects to be citizens of the United States.

Your petitioner files herewith a copy of the material sections of said act as Exhibit 13 (Book of Exhibits, page 100) and asks that same be considered a part of this petition as though incorporated herein and at length set forth.

Your petitioner further states that the Commission to the Five Civilized Tribes (popularly known as the "Dawes Commission") was kept in active existence from the time of its creation under the said act of Congress of March 3, 1893, to the first of July, 1905, and since such last-mentioned date the work of completing the unfinished business of the Commission to the Five Civilized Tribes has devolved and now devolves upon the Secretary of the Interior, and all powers heretofore granted to the said Commission to the Five Civilized Tribes were on the said first day of July, 1905, and since such time have been and now are conferred upon the said Secretary of the Interior, and the said Secretary of the Interior has appointed Tams Bixby, as Commissioner to the Five Civilized Tribes to aid the said Secretary of the Interior in discharging the duties devolving upon him as successor to the said Commission to the Five Civilized Tribes, as aforesaid.

Your petitioner further states that the said Commission to the Five Civilized Tribes, by act of June 10, 1896, was authorized to prepare a roll of the citizens of the said Five Civilized Tribes, including freedmen entitled to citizenship in said tribes, and the Commission was authorized to make a report of lands leased in the various nations and the holdings of the members of the various tribes.

Your petitioner further states that by an act of Congress of March 1, 1895 (28 Stat., 693), entitled *"An act to provide*

for the appointment of additional judges of the United States court in the Indian Territory, and for other purposes," two additional judges were appointed and additional civil and criminal laws put in force in the Indian Territory.

Your petitioner further states that by an act of Congress of April 25, 1896, entitled *"An act to grant railroads in the Indian Territory additional powers to secure depot grounds"* (28 Stat., 109), the Secretary of the Interior was authorized to grant the use of additional lands "held by the Indians in common" as may be necessary for depot purposes.

Your petitioner further states that by said act of Congress of June 10, 1896, further provision was made for the public surveying of all lands in the Indian Territory, under the general provisions of law then in force relating to surveys of the public lands, and the lands in the Indian Territory have been surveyed as other public lands of the United States, at its expense.

Your petitioner further states that the Commission to the Five Civilized Tribes, immediately upon its appointment, began negotiating with the Five Civilized Tribes as in said acts of Congress provided, but failed for some years to arrive at any agreement with any of said tribes of Indians, as will appear by the annual reports of said Commission for the years 1894, 1895, and 1896, reference to which is hereby made, and in the report of the said Commission for the year 1894 said Commission reported that they found unanimity among the people against the cession of any of the lands to the United States, and the Commission had abandoned all idea of purchasing any of it and determined to offer them an equal division of all their lands.

Your petitioner further states that the said Commission to the Five Civilized Tribes also found and reported in said report for 1894 that the executory conditions upon which the communal rights of the several Indian tribes were based had not been performed by the Indians, and that said executory conditions were impossible of execution and had ceased to be

applicable, and that the various tribes of Indians had invited within their borders large numbers of white people, who had been adopted as citizens and were participating in the benefits of citizenship, and were holding and using the lands of the said tribes of Indians contrary to the grants thereof to the Indian nations; and that the said tribes had sold to the United States one-half of their original territory, to be opened up to white settlement, on their western borders; and a territorial government had been organized in their own territory, and that the stipulations in their title that they should hold their lands for the common and equal use of their citizens had been broken and were not complied with, and that the original idea of a community of property had been entirely lost sight of and disregarded under every branch of the administration of their affairs, and that said lands had been set apart for said tribes in their tribal capacities by conveyances in trust for specific uses clearly indicated in the treaties themselves, and for no other purposes, and that the lands were intended to be held by the tribes for their enjoyment in common, and that the tribes could make no other or different uses thereof, and that they had no power to grant the lands to any one, or an exclusive use of any portion thereof to any one, and that the tribal governments had wholly perverted their high trust; and your petitioner alleges that all of said facts so reported by the said Commission were and are true.

Your petitioner further states that in the report of the Commission to the Five Civilized Tribes for the year 1895 it states that it had presented to the Indian nations every argument to make clear the necessity for a change in the tenure of their tribal property, but the Indians had declined to agree to any such proposed change in the tenure of their lands; and in said report the said Commission further reported that the conditions imposed by the various treaties granting lands to the Indian tribes for their common use no longer obtained, and that a restoration of the treaty status

was an impossibility, and declared it to be the imperative duty of Congress to assume at once political control in the Indian Territory, and recommended territorial government adapted to their condition and so framed as to secure to the Indians and others their vested rights, and that a United States court be created in the Indian Territory, and that the complicated question in which the tenure of their lands was involved be left to the courts for adjudication.

Your petitioner further states that in the report of the Commission to the Five Civilized Tribes for the year 1896 the said Commission said that there was a growing desire among the Indians for a change from their present condition, both in respect to the tenure and use of their tribal property and in the manner in which their government was being conducted, but that this desire was not universal, and many were unwilling to consent to any modification in their tribal holdings of the land, and that during all of said negotiations, and in the agreements reached and hereafter referred to, the Indians only agreed to a change in their tribal title and to accept allotment upon condition that the United States would cause a new patent to be issued to each allottee, conveying all its claims whatsoever to each allotment, and relinquishing all of its rights of reversion and remainder in and to said lands, notwithstanding such estate of reversion and remainder had already been granted to your petitioner by the act of July 25, 1866, as hereinbefore and hereinafter stated.

Your petitioner further states that in the negotiations with the Commission to the Five Civilized Tribes the Indian tribes also claimed that it was no part of the common or communal system then in vogue or practice to give or secure to any citizen full control over any particular part of the common domain, because all persons had equal rights in and to the whole of the lands and every part and parcel thereof, as will appear from the report of said Commission for the year 1897, page 40, to which reference is hereby

made, and that, so far as allotment of the domain was concerned, a complete and simple system of allotment had been in effect without any change in their title or tenure to the lands, which system consisted in securing to each citizen so much of the domain as he could cultivate, the land itself remaining the common property of the tribes; and in said report of the Commission to the Five Civilized Tribes for the year 1897 the fact that an agreement had been reached with the Creek tribe of Indians was duly reported, but the said Commission further reported that it had failed of ratification by the National Council of the Muscogee or Creek nation, and that the work of the Commission had reached a stage requiring serious consideration in respect to new legislation, and that a change in the tenure of the tribal property of the Indians had become an imperative and inevitable necessity, and that one serious objection to the scheme of allotment was the rights of your petitioner under the acts of July 25 and 26, 1866, granting to your petitioner the lands hereinbefore specified, and that your petitioner was resisting the proposed allotment to the utmost of its power, and had, through counsel, with great earnestness—first to the Commission, next to the Secretary of the Interior, and then to the President—presented its claims and demands.

Your petitioner further states that on June 28, 1898, the Congress of the United States passed an act entitled "*An act for the protection of the people of the Indian Territory, and for other purposes*" (30 Stat., 495), commonly known as the "Curtis act," and as such hereafter referred to. A copy of said act is filed herewith as Exhibit 13 (Book of Exhibits, page 110), and your petitioner asks that the same be considered a part hereof as though incorporated herein and at length set forth. By this act additional civil and criminal laws were put in force in the Indian Territory, and it is provided in section 11 of said act that when the roll of citizens of any of such nations or tribes is completed and the survey of the lands also completed, the Commission to the Five

Civilized Tribes should proceed to allot the exclusive use and occupancy of the surface of all the lands of said tribe or nation susceptible of allotment among the citizens thereof, as shown by said rolls, and reserved and set apart certain lands for town sites, churches, schools, and burying grounds; and further provided that nothing therein contained should in any way affect any vested legal rights which had been theretofore granted by act of Congress. This act further ratified agreements which had been entered into between the Choctaw and Chickasaw tribes of Indians and the Muskogee or Creek tribe of Indians, with the Commission to the Five Civilized Tribes, pursuant to the terms of the statutes hereinabove referred to. Under the authority of section 11 of the "Curtis act," said Commission opened land offices in various towns in the Indian Territory and began the work of allotment, as therein provided.

Your petitioner further states that by section 28 of the "Curtis act" all tribal courts in the Indian Territory were abolished and all civil and criminal cases then pending were transferred to the United States court, and all tribal laws were abolished and declared non-enforceable in said United States court.

Your petitioner further states that it protested against the passage of all of the aforesaid acts and agreements which in any way interfered with or disturbed or sought to change or affect its right, title, and interest to the land so as aforesaid conveyed to it, and also appeared before the Commission to the Five Civilized Tribes and the representatives of the several Indian nations in their negotiations for treaties and agreements under the said acts of Congress, and likewise protested against any agreement or act which would in any way interfere with or disturb its vested rights in and to the said lands, and on September 24, 1897, submitted to the Commission to the Five Civilized Tribes and the representatives of the Muskogee or Creek nation a paper setting forth its rights in and to the said lands so as aforesaid granted to it. Your

petitioner files herewith a copy of the paper so submitted to the "Dawes Commission" and the representatives of the Muskogee or Creek nation, setting forth its right in and to said lands, dated September 24, 1897, as Exhibit 12 (Book of Exhibits, page 94), and asks that same be considered a part of this petition with like effect as though same was herein incorporated and set forth.

Your petitioner further shows that it likewise submitted to the "Dawes Commission" and the Commission representing the Cherokee nation a paper setting forth its rights in and to said lands in the Cherokee nation, and your petitioner files herewith a copy thereof as Exhibit 10 (Book of Exhibits, page 82) and asks that same be considered a part of this petition with like effect as though same was herein incorporated and set forth.

Your petitioner further shows that it likewise filed with the "Dawes Commission" and with the Commission representing the Choctaw and Chickasaw nations a paper setting forth its right to said lands so as aforesaid granted to it in the Choctaw and Chickasaw nations, and your petitioner files herewith a copy thereof as Exhibit 11 (Book of Exhibits, page 88) and asks that same be considered a part of this petition with like effect as though same was herein incorporated and set forth.

Your petitioner further shows that the Commission to the Five Civilized Tribes and the Commissions representing the Cherokee, Creek, Choctaw, and Chickasaw nations in their various negotiations were fully informed of the claims and rights of your petitioner in and to the lands so granted to it by said acts of Congress of July 25 and 26, 1866.

Your petitioner further shows that its railroad as definitely located and constructed through the Indian Territory is from the northern line of the Indian Territory and the southern line of the State of Kansas to the southern line of the Indian Territory and the northern line of the State of Texas, a distance of 243.31 miles, and that the grants

of land to your petitioner under the act of Congress of July 25, 1866, was 12,800 acres to the mile, or 3,114,368 acres, or 4,866 solid sections, or 135 solid townships. By multiplying the mileage length of your petitioner's railroad by the number of acres of land granted per mile gives the full quota of lands granted by said act of Congress.

Your petitioner states that it has caused a computation to be made of the acreage of the odd-numbered sections within the twenty-mile limits of its land grant, and as set forth in the description of such odd-numbered sections in Exhibit 43, and that the acreage of said odd-numbered sections within the twenty-mile limits is 3,064,390 acres, or 4,788 sections, or 133 townships.

Your petitioner shows that under the act of July 25, 1866, it is provided that if any of the lands in place should be lost that your petitioner should have the right to indemnity lands from the even-numbered sections within the twenty-mile limits of the land grant.

Your petitioner further shows that notwithstanding it built its railroad through the Indian Territory as required by the said act of July 25, 1866, and has ever since operated and maintained it as a first-class railroad and in full compliance with all the conditions and requirements of the said act, that the United States has broken the covenants of its land grants to your petitioner and failed and refused to patent the said lands to your petitioner, and, on the contrary, has by legislation of Congress and acts of the executive departments of the United States misconstrued and disregarded its obligations to your petitioner and has issued patents and is in the process of issuing patents to the lands granted to your petitioner to certain Indians and other persons, as herein shown.

Your petitioner avers that while it appears from the act of Congress herein recited, and known as the "Curtis act" of June 28, 1898, that it was the purpose of Congress by that act to divide among the Indian allottees only surface

possessory rights in the tribal lands, and not to disturb the vested rights of your petitioner to its granted lands, yet subsequently thereto, by the acts of Congress herein recited, the Indian title to your petitioner's granted lands was extinguished and the lands themselves were divided among the allottees and sold to purchasers, the Congress and the executive departments of the United States intending thereby to grant to the individual Indians and allottees and purchasers the entire title to said lands, including that of the United States, the communal, possessory rights of the Indian nations or tribes, and individual Indians and the reversionary and remainder estate or title of your petitioner. By thus changing its original purpose, as expressed in the "Curtis act," and patenting the lands to the allottees and purchasers, the United States broke the covenants of its land grant to your petitioner, to its great damage, as herein shown.

Your petitioner further states that on March 1, 1901, the Congress of the United States passed an act entitled *"An act to ratify and confirm the agreement with the Muskogee or Creek tribe of Indians, and for other purposes"* (31 Stat., 861). A copy of said act is filed herewith as Exhibit 13 (Book of Exhibits, page 163) and your petitioner asks that the same be considered a part hereof with like effect as though incorporated herein and at length set forth. By this act it was provided that all lands of the said tribe should be allotted among the citizens of the tribe, so as to give each an equal share of the whole, and it further provided that all allotments which had been made to Creek citizens by the Commission to the Five Civilized Tribes under the terms of the "Curtis act," and as to which there was no contest pending, were confirmed; and it further provided that the Commission to the Five Civilized Tribes should continue the work of allotting the Creek lands. Certain lands by this act were set aside for town sites and to be sold to any and all citizens of the United States as therein provided. Other

lands were set aside for certain schools and others to certain churches, and by section 24 thereof all lands to which at the date of the ratification of this agreement any railroad company, under any treaty or act of Congress, shall have vested right for right of way, depots, station-houses, water stations, stock yards, or similar uses connected with the maintenance and operation of a railroad were reserved from allotment. Section 23 of said agreement, which was ratified by said act of Congress, reads as follows:

> "Immediately after the ratification of this agreement by Congress and the tribe, the Secretary of the Interior shall furnish the principal chief with blank deeds necessary for all conveyances herein provided for, and the principal chief shall thereupon proceed to execute in due form and deliver to each citizen who has selected or may hereafter select his allotment, which is not contested, a deed conveying to him all right, title and interest of the Creek nation and of all other citizens in and to the lands embraced in his allotment certificate, and such other lands as may have been selected by him for equalization of his allotment.
>
> "The principal chief shall, in like manner and with like effect, execute and deliver to proper parties deeds of conveyance in all other cases herein provided for. All lands or town lots to be conveyed to any person shall, so far as practicable, be included in one deed, and all deeds shall be executed free of charge.
>
> "All conveyances shall be approved by the Secretary of the Interior, which shall serve as a relinquishment to the grantee of all the right, title and interest of the United States in and to the lands embraced in his deed.
>
> "Any allottee accepting such deed shall be deemed to assent to the allotment and conveyance of all the lands of the tribe, as provided herein, and as a relinquishment of all his right, title and interest in and to the same, except in the proceeds of lands reserved from allotment.
>
> "The acceptance of deeds of minors and incom-

petents, by persons authorized to select their allotments for them, shall be deemed sufficient to bind such minors and incompetents to allotment and conveyance of all other lands of the tribe, as provided herein.

"The transfer of the title of the Creek tribe to individual allottees and to other persons, as provided in this agreement, shall not inure to the benefit of any railroad company, nor vest in any railroad company and right, title or interest in or to any of the lands in the Creek nation.

"All deeds when so executed and approved shall be filed in the office of the Dawes Commission, and there recorded without expense to the grantee, and such records shall have like effect as other public records."

The agreement with the Creek Nation, approved March 1, 1901, contained the following provisions:

"3. All lands of said tribe, except as herein provided, shall be allotted among the citizens of the tribe by said Commission, so as to give each an equal share of the whole in value as nearly as may be, in manner following: There shall be allotted to each citizen one hundred and sixty acres of land—boundaries to conform to the Government survey—which may be selected by him so as to include improvements which belong to him. One hundred and sixty acres of land, valued at six dollars and fifty cents per acre, shall constitute the standard value of an allotment, and shall be the measure for the equalization of values; and any allottee receiving lands of less than such standard value may, at any time, select other lands which at their appraised value, are sufficient to make his allotment equal in value to the standard so fixed.

* * * * * * *

"9. When allotment of one hundred and sixty acres has been made to each citizen, and the residue of lands not herein reserved or otherwise disposed of, and all the funds arising under this agreement shall be used for the purpose of equalizing allotments, and if the same be insufficient therefor, the defi-

> ciency shall be supplied out of any other funds of the tribes, so that the allotments of all citizens may be made equal in value, as nearly as may be, in manner herein provided."

This provision (section 9) was repealed by the appropriation act of April 21, 1904, in the following language:

> * * * "*And provided further*, That the Secretary of the Interior is hereby granted authority to sell at public sale, in tracts not exceeding one hundred and sixty acres to any one purchaser, under rules and regulations to be made by the Secretary of the Interior, the residue of land in the Creek nation belonging to the Creek tribe of Indians, consisting of about five hundred thousand acres, and being the residue of lands left over after allotments of one hundred and sixty acres to each of said tribe."
>
> 33 Stats., p. 204.

The following clause was inserted in the Indian appropriation act of March 3, 1905, for the purpose of repealing the law last above quoted and restoring the provision of the Creek agreement of March 1, 1901:

> "That the provision in the Indian appropriation bill for the fiscal year ending June thirtieth, nineteen hundred and four, authorizing the Secretary of the Interior to sell the residue of the lands of the Creek nation not taken as allotments, is hereby repealed and the provision of the Creek agreement, Article III, approved March first, nineteen hundred and one, is hereby restored and re-enacted."
>
> 33 Stats., p. 1072.

Your petitioner further shows that on June 30, 1902, the Congress of the United States passed an act entitled "*An act to ratify and confirm the supplemental agreement with the Creek tribe of Indians, and for other purposes*" (32 Stat. at L., 500), which agreement and act was also ratified by the

Creek council July 26, 1902, and was proclaimed in effect August 3, 1902, by the President of the United States, and your petitioner files herewith a copy of said act, as Exhibit 13 to this petition (Book of Exhibits, page 192), and asks that the same be considered a part hereof with like effect as though the same was incorporated herein and at length set forth.

Your petitioner further shows that on July 1, 1902, the Congress of the United States passed an act entitled "*An act to ratify and confirm the agreement with the Choctaw and Chickasaw tribes of Indians, and for other purposes*" (32 Stat. at L., 641), which agreement and act was ratified by the Choctaw and Chickasaw nations in an election held September 25, 1902, and your petitioner files herewith a copy of said act as Exhibit 13 (Book of Exhibits, page 203) and asks that the same be considered a part of this petition with like effect as though the same was incorporated herein and at length set out.

Section 16 of the supplemental agreement with the Creek nation, ratified by the act of June 30, 1902 (32 Stat. L., 500), provides as follows:

> "Lands allotted to citizens shall not in any manner whatever be incumbered or sold to secure or satisfy any debt or obligation, nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior. Each citizen shall select from his allotment forty acres of land, or a quarter of a quarter section, as a homestead, which shall be and remain non-taxable, inalienable and free from any incumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead in which this condition shall appear."

Your petitioner further shows that on the 28th day of April, 1904, the Congress of the United States passed an act entitled "*An act to authorize the Secretary of the Interior to add to the segregation of coal and asphalt lands in the Choctaw and Chickasaw nations, Indian Territory, and for other purposes*" (33 Stat. at L., 544), and your petitioner files herewith a copy of said act as Exhibit 13 (Book of Exhibits, page 277) and asks that the same be considered a part hereof with like effect as though the same was herein incorporated and at length set forth.

Your petitioner further shows that on the first day of July, 1902, the Congress of the United States passed an act entitled "*An act for the allotment of lands in the Cherokee nation, for the disposition of town sites therein, and for other purposes*" (32 Stat. at L., 716), a copy whereof is filed herewith as Exhibit 13 (Book of Exhibits, page 299), and your petitioner asks that same be considered a part hereof with like effect as though same was incorporated herein and at length set out.

Your petitioner further shows that in and by the various agreements between the United States and the Cherokee, Creek, Choctaw, and Chickasaw nations and acts ratifying the same, hereinbefore referred to, it was provided that the said nations should not continue to exist longer than March 4, 1906, subject to such further legislation as the Congress might deem proper; and your petitioner further shows that the Congress of the United States, by *joint resolution* approved March 2, 1906 (Book of Exhibits, p. 279), provided that the tribal existence and then present tribal governments of the said tribes or nations were to continue in full force and effect "for all purposes under existing laws until all property of such tribes, or the proceeds thereof, shall be distributed among the individual members of said tribes, unless otherwise provided by law."

Your petitioner further shows that by an act of the Congress of the United States approved April 26, 1906, entitled

"*An act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes*" (34 Stat. at L., page 137; Book of Exhibits, page 280), it was, among other things, provided that the tribal existence and then present tribal government of said Indian tribes or nations should continue in full force and effect "for all purposes authorized by law until otherwise provided by law," but your petitioner avers that long prior to the adoption of said *joint resolution* of the Congress of the United States, approved March 2, 1906, and the approval of the act of April 26, 1906, the Indian or tribal title in and to the lands hereinbefore particularly described and claimed by your petitioner had been extinguished and the said Cherokee nation, the said Creek nation, the said Choctaw nation, and the said Chickasaw nation had ceased to occupy or claim the same as tribes or nations, and had ceased to live upon and occupy said lands in common as nations, and said lands had been allotted in severalty to certain individual members of said nations as citizens of the United States, or reserved for town sites and other purposes, as provided in said acts of Congress hereinbefore referred to, notwithstanding the grant of same to your petitioner by the United States under said land-grant acts of July 25 and 26, 1866, and notwithstanding the protests of your petitioner to the making of all said agreements between the United States and said Indian tribes or nations, and notwithstanding the protests of your petitioner against the passage of the acts ratifying the same, and notwithstanding the protests of your petitioner against the allotment of said lands at every step and stage thereof, as will hereinafter more particularly appear.

Your petitioner further shows that on March 3, 1903, the Congress of the United States passed an act (32 Stat. at L., 982; Book of Exhibits, page 264), in which, among other things, it was provided "that nothing herein contained shall prevent the surveying and platting, at their own expense, of town sites by private parties, where stations are located along

the line of railroads, nor the unrestricted alienation of lands for that purpose when recommended by the Commission to the Five Civilized Tribes and approved by the Secretary of the Interior;" and your petitioner further shows that on April 21, 1904, the Congress of the United States passed an act entitled *"An act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes, for the fiscal year ending June 30, 1905, and for other purposes"* (37 Stat. at L., 189), wherein, among other things, it was provided that "all the restrictions upon the alienation of lands of the allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood, except minors, are, except as to the homesteads, removed, and all restrictions upon the alienation of all other allottees of said tribes, except minors, and except as to homesteads, may, upon the approval of the Secretary of the Interior, be removed, under such rules and regulations as the Secretary of the Interior may prescribe, upon application to the United States Indian agent at the Indian agency, in charge of the Five Civilized Tribes, if said agent is satisfied upon full investigation of each individual case, that such removal of restrictions is for the best interest of said allottee. The finding of the United States Indian agent and the approval of the Secretary of the Interior shall be in writing and shall be recorded in the same manner as patents for lands are recorded." Your petitioner files herewith as Exhibit 13 (Book of Exhibits, page 269) a copy of the provisions of said act herein referred to and asks that same be considered a part hereof with like effect as though incorporated herein and at length set out.

Your petitioner further states that on the 16th day of June, 1906, the Congress of the United States passed an act entitled *"An act to enable the people of Oklahoma and of the Indian Territory to form a constitution and State government, and be admitted into the Union on an equal footing with the original States, and to enable the people of New*

Mexico and of Arizona to form a constitution and State government and be admitted into the Union on an equal footing with the original States" (34 Stat. at L., page 267), to which reference is hereby made; and your petitioner further states that under and pursuant to said act the people of the Oklahoma and Indian Territories, including former members of the Cherokee, Creek, Choctaw, and Chickasaw nations, duly elected delegates to form a constitutional convention for the proposed State, and such convention has framed a constitution which will be submitted to a vote of the people of the Oklahoma and Indian Territories for approval on the 7th of August next; and your petitioner further shows that said constitutional convention has by ordinance provided for the election of officers for a full State government, including members of the legislature and five representatives to Congress, as in said act provided. Your petitioner herewith files a copy of the sections of said act relating to Oklahoma, as Exhibit 42 (Book of Exhibits, page 568), and asks that same be considered a part of this petition as though incorporated herein.

Your petitioner further shows that, under the provisions of the acts of Congress hereinbefore referred to, the United States, by and through its Commission and Commissioner to the Five Civilized Tribes, has allotted practically all of the lands so as aforesaid granted to your petitioner, except only such lands as are reserved for town sites and other purposes, and which are being disposed of by the United States under general laws, as hereinbefore and hereinafter shown, and the United States has executed and delivered deeds or patents to the allottees of practically all of said lands, as provided for in said acts of the Congress of the United States.

Your petitioner further shows that upon the opening of the land office of the United States at Vinita, Cherokee nation, Indian Territory, and before any individual Cherokee citizen had indicated in any way to said Commission, and before the said Commission had indicated in any way the

particular land which was to constitute the allotment of any Cherokee citizen, it served upon the members of said Commission and each of them a notice in writing of its right, title, and interest to every alternate section of land or parts thereof, designated by odd numbers, to the extent of ten sections per mile on each side of its railway and within twenty miles from its line of railway through the Indian Territory, under said acts of Congress, and in and by said notice to the said Commission of the United States to the Five Civilized Tribes your petitioner demanded that the sections of land therein referred to be set apart to it, and that said sections, or any parts thereof, be not allotted to any other persons whomsoever, and that said Commission should not receive any application from any member of said tribe or nation for the allotment of said odd-numbered sections. Your petitioner files herewith as Exhibit 14 (Book of Exhibits, page 304) a copy of said notice and demand and asks that same be considered a part of this petition as though incorporated herein and at length set out.

Your petitioner further shows that, in and by the terms of the several acts of Congress hereinbefore referred to, town-site commissions were appointed by the Secretary of the Interior of the United States to lay out, plat, and dispose of certain lands in the Cherokee nation reserved for town-site purposes, and that your petitioner duly served upon the town-site Commission in and for the Cherokee nation a notice substantially similar to the notice served upon the Commission to the Five Civilized Tribes, hereinbefore and in the paragraph last preceding referred to, of your petitioner's right, claim, interest, and estate in and to the odd-numbered sections hereinbefore particularly described, and protested against said town-site Commission surveying, laying out, platting, or appraising in any town sites of the said nation any town lots, blocks, streets, alleys, or parks upon any of the sections of land or any parts thereof hereinbefore referred to, and which had been granted to your petitioner by

the United States under and pursuant to the contract between the United States and your petitioner by virtue of said acts of Congress of the United States approved July 25 and July 26, 1866. Your petitioner files herewith a copy of said notice as Exhibit 16 (Book of Exhibits, page 321) and asks that same be considered a part of this petition with like effect as though same was herein incorporated and at length set out.

Your petitioner further shows that it duly served upon the United States Indian agent for the Indian Territory a similar notice of its right, title, interest, and estate in and to the sections of land referred to in the notice served upon the members of the Commission to the Five Civilized Tribes, and demanded of said Indian agent that he receive no applications to sell or lease any of said lands, and that he should not list or advertise any of said lands for sale or lease, and that he should not receive any bid or bids for any of said lands, and that he should not permit any deeds or leases for said lands to be executed or acknowledged before him, and that he should not transmit any deed or leases to any of said lands to the Secretary of the Interior or to any other official, and that he should not deliver any deeds or leases to any grantee or other person, and that he should take no part whatever in any transaction looking to the sale or leasing of any of said lands. Your petitioner files herewith as Exhibit 32 (Book of Exhibits, page 433) a copy of said notice and demand and asks that same be considered a part hereof with like effect as though same was herein incorporated and at length set forth.

Your petitioner further shows that it also served upon the Secretary of the Interior of the United States a similar notice to that served upon the Indian agent and demanded that the sections of land hereinbefore referred to as having been granted to your petitioner be set apart to and treated as the lands of your petitioner, and that he receive no applications

to sell or lease any of said lands, and that he should not approve any deeds or leases to any of said lands, and that he should take no part whatever in any transaction looking to the sale or leasing of any of said lands. A copy of said notice and demand so served upon the Secretary of the Interior is filed herewith as Exhibit 31 (Book of Exhibits, page 427), and your petitioner asks that same be considered a part hereof with like effect as though same was herein incorporated and at length set out.

Your petitioner shows that it also served upon the United States Indian inspector for the Indian Territory and upon the supervising engineer of the United States in charge of town sites in the Indian Territory a similar notice and demand that said officers should not cause to be surveyed, allotted, advertised, or platted in the Indian Territory, for town site or town sites, said sections of land hereinbefore particularly described or any part or parts thereof so granted to your petitioner as aforesaid. Your petitioner files herewith a copy of said notice and demand as Exhibit 33 (Book of Exhibits, page 440) and asks that same be considered a part hereof with like effect as though same was herein incorporated and at length set forth.

Your petitioner further shows that it duly served upon the Principal Chief of the Cherokee Nation a notice and demand similar to the notice and demand served upon the said Commissioner to the Five Civilized Tribes upon the opening of the land office at Vinita, and your petitioner files herewith a copy of said notice and demand so served upon the Principal Chief of the Cherokee Nation as Exhibit 15 (Book of Exhibits, page 314) and asks that same be considered a part of this petition with like effect as though same was incorporated herein and at length set out.

Your petitioner further shows that upon the opening of the land office of the United States in the Creek nation, Indian Territory, and before any individual Creek citizen

had indicated in any way to said Commission, and before the said Commission had indicated in any way the particular land which was to constitute the allotment of any Creek citizen, it served upon the members of said Commission and each of them a notice in writing of its right, title, and interest to every alternate section of land or parts thereof, designated by odd numbers, to the extent of ten sections per mile on each side of its railway and within twenty miles from its line of railway through the Indian Territory under said acts of Congress; and in and by said notice to the said Commission of the United States to the Five Civilized Tribes your petitioner demanded that the sections of land therein referred to be set apart to it, and that said sections or any parts thereof be not allotted to any other persons whomsoever, and that said Commission should not receive any application from any member of said tribe or nation for the allotment of said odd-numbered sections. Your petitioner files herewith as Exhibit 17 (Book of Exhibits, page 328) a copy of said notice and demand and asks that same be considered a part of this petition as though incorporated herein and at length set out.

Your petitioner further shows that, in and by the terms of the several acts of Congress hereinbefore referred to, town-site commissions were appointed by the Secretary of the Interior of the United States to lay out, plat, and dispose of certain lands in the Creek nation reserved for town-site purposes, and that your petitioner duly served upon the town-site commission in and for the Creek nation a notice substantially similar to the notice served upon the Commission to the Five Civilized Tribes, hereinbefore and in the paragraph last preceding referred to, of your petitioner's right, claim, interest, and estate in and to the odd-numbered sections hereinbefore particularly described, and protested against said town-site commission surveying, laying out, platting, or appraising, in any town sites of the said nation, any town lots, blocks, streets, alleys, or parks upon any of

the sections of land or any part thereof hereinbefore referred to, and which have been granted to your petitioner by the United States under and pursuant to the contract between the United States and your petitioner by virtue of said acts of Congress of the United States approved July 25 and July 26, 1866. Your petitioner files herewith a copy of said notice as Exhibit 19 (Book of Exhibits, page 344) and asks that same be considered a part of this petition with like effect as though same was herein incorporated and at length set out.

Your petitioner further shows that it duly served upon the Principal Chief of the Creek nation a notice and demand similar to the notice and demand served upon the said Commission to the Five Civilized Tribes upon the opening of the land office in the Creek nation, and your petitioner files herewith a copy of said notice and demand so served upon the Principal Chief of the Creek nation as Exhibit 18 (Book of Exhibits, page 337), and asks that same be considered a part of this petition with like effect as though same were incorporated herein and at length set out.

Your petitioner further shows that upon the opening of the land office of the United States in the Choctaw nation, Indian Territory, and before any individual Choctaw citizen had indicated in any way to said Commission, and before the said Commission had indicated in any way the particular land which was to constitute the allotment of any Choctaw citizen, it served upon the members of said Commission and each of them a notice in writing of its right, title, and interest to every alternate section of land or parts thereof, designated by odd numbers, to the extent of ten sections per mile on each side of its railway and within twenty miles from its line of railway through the Indian Territory, under said acts of Congress; and in and by said notice to the said Commission of the United States to the Five Civilized Tribes your petitioner demanded that the sections of land therein referred to be set apart to it, and that said sections or any

parts thereof be not allotted to any other persons whomsoever, and that said Commission should not receive any application from any member of said tribe or nation for the allotment of said odd-numbered sections. Your petitioner files herewith as Exhibit 22 (Book of Exhibits, page 364) a copy of said notice and demand and asks that same be considered a part of this petition as though incorporated herein and at length set out.

Your petitioner further shows that, in and by the terms of the several acts of Congress hereinbefore referred to, town-site commissions were appointed by the Secretary of the Interior of the United States to lay out, plat, and dispose of certain lands in the Choctaw nation reserved for town-site purposes, and that your petitioner duly served upon the town-site commission in and for the Choctaw nation a notice, substantially similar to the notice served upon the Commission to the Five Civilized Tribes hereinbefore and in the paragraph last preceding referred to, of your petitioner's right, claim, interest, and estate in and to the odd-numbered sections hereinbefore particularly described, and protested against said town-site commission surveying, laying out, platting, or appraising in any town-sites of the said nation any town lots, blocks, streets, alleys, or parks upon any of the sections of land or any parts thereof hereinbefore referred to and which had been granted to your petitioner by the United States under and pursuant to the contract between the United States and your petitioner by virtue of said acts of Congress of the United States approved July 25 and July 26, 1866. Your petitioner files herewith a copy of said notice as Exhibit 26 (Book of Exhibits, page 392) and asks that same be considered a part of this petition with like effect as though same was herein incorporated and at length set out.

Your petitioner further shows that it duly served upon the Principal Chiefs of the Choctaw nation notices and demand similar to the notice and demand served upon the

said Commission to the Five Civilized Tribes upon the opening of the land office in said nation, and your petitioner files herewith copies of said notice and demand so served upon the Principal Chiefs of the Choctaw nation as Exhibits 23-24, and 25 (Book of Exhibits, pages 372, 378, and 385), and asks that same be considered parts of this petition with like effect as though same were incorporated herein and at length set out.

Your petitioner further shows that upon the opening of the land office of the United States in the Chickasaw nation, Indian Territory, and before any individual Chickasaw citizen had indicated in any way to said Commission and before the said Commission had indicated in any way the particular land which was to constitute the allotment of any Chickasaw citizen, it served upon the members of said Commission and each of them a notice in writing of its right, title, and interest to every alternate section of land or parts thereof, designated by odd numbers, to the extent of ten sections per mile on each side of its railway and within twenty miles from its line of railway through the Indian Territory under said acts of Congress; and in and by said notice to the said Commission of the United States to the Five Civilized Tribes your petitioner demanded that the sections of land therein referred to be set apart to it, and that said sections or any parts thereof be not allotted to any other persons whomsoever, and that said Commission should not receive any application from any member of said tribe or nation for the allotment of said odd-numbered sections. Your petitioner files herewith as Exhibit 27 (Book of Exhibits, page 399) a copy of said notice and demand and asks that same be considered a part of this petition as though incorporated herein and at length set out.

Your petitioner further shows that, in and by the terms of the several acts of Congress hereinbefore referred to, townsite commissioners were appointed by the Secretary of the Interior of the United States to lay out, plat, and dispose of certain lands in the Chickasaw nation reserved for town-

site purposes, and that your petitioner duly served upon the town-site commission in and for the Chickasaw nation a notice substantially similar to the notice served upon the Commission to the Five Civilized Tribes, hereinbefore and in the paragraph last preceding referred to, of your petitioner's right, claim, interest, and estate in and to the odd-numbered sections hereinbefore particularly described, and protested against said town-site commission surveying, laying out, platting, or appraising in any town sites of the said nation any town lots, blocks, streets, alleys, or parks upon any of the sections of land or any parts thereof hereinbefore referred to, and which had been granted to your petitioner by the United States under and pursuant to the contract between the United States and your petitioner, by virtue of said acts of Congress of the United States approved July 25 and July 26, 1866. Your petitioner files herewith a copy of said notice as Exhibit 30 (Book of Exhibits, page 420) and asks that same be considered a part of this petition with like effect as though same was herein incorporated and at length set out.

Your petitioner further shows that it duly served upon the Governors of the Chickasaw nation notices and demands, similar to the notice and demand served upon the said Commission to the Five Civilized Tribes, upon the opening of the land office in said nation, and your petitioner files herewith copies of said notices and demands so served upon the governors of the Chickasaw nation as Exhibits 28 and 29 (Book of Exhibits, pages 407 and 414) and asks that same be considered parts of this petition with like effect as though same were incorporated herein and at length set out.

Your petitioner further shows that after rolls of the Cherokee, Creek, Choctaw, and Chickasaw citizens were made up by the Commission to the Five Civilized Tribes the said Commission proceeded to allot same as in the said several acts of Congress hereinbefore referred to provided. Among other things, said acts of the Congress of the United States provided that the said lands, including the odd-numbered

sections granted as aforesaid to your petitioner, should be by said Commission appraised. Said acts provided that said lands should, for the purposes of the allotment thereof among the Indians on a value basis rather than an acreage basis, be appraised by the said Commission to the Five Civilized Tribes in prices ranging from $6.50, representing the best agricultural lands, downward in proportion to their value as compared with the value of the best agricultural lands. Your petitioner states that the said Commission has caused to be appraised 2,894,468 acres of the granted lands which have been allotted or are in the course of allottment, shown on Exhibit No. 43 (Book of Exhibits, page 591 *et seq.*), at the aggregate value of $10,056,721.85, but your petitioner states that said appraised value does not and did not represent the real value of said odd-numbered sections and parts thereof at the time of the appraisement, but that said odd-numbered sections and parts thereof at said time were of the reasonable value of twenty dollars per acre.

Your petitioner further states that, in addition to the odd-numbered sections and parts of the same so as aforesaid allotted and conveyed to individual Indians by the United States and so as aforesaid granted to your petitioner under and pursuant to the covenants between your petitioner and the United States by said act of Congress of July 25, 1866, the United States has caused to be laid out, upon certain of said odd-numbered sections and parts thereof, town sites, and has caused the same to be surveyed and platted into blocks and lots, with streets and alleys running through the same, and your petitioner files herewith a list of the town sites, with a particular description of the odd-numbered sections or parts thereof constituting said town sites or portions thereof so as aforesaid granted to your petitioner, as Exhibit No. 35 (Book of Exhibits, page 495), and asks that the same be considered a part of this petition with the same effect as though herein incorporated and at length set out.

Your petitioner further states that the United States, upon

the laying out and platting of such town sites, proceeded to sell the lots and blocks thereof, and has executed or caused to be executed to the purchasers thereof deeds or patents.

Your petitioner further states that the United States, by the acts of the Congress of the United States aforesaid, reserved from allotment certain coal and asphalt lands and certain other lands for the particular purposes as therein provided, and said lands so reserved, except the coal and asphalt lands, are being conveyed by the United States to the persons and parties therein named. Your petitioner states that the files and records of the Commission and Commissioner to the Five Civilized Tribes show such reservations, so far as they have been selected by the reservees thereof, upon the odd-numbered sections so as aforesaid granted to your petitioner, and your petitioner asks that the same be considered a part of this petition as though incorporated herein and at length set out, and your petitioner will produce said files and records or certified copies thereof at the hearing hereof, as to the acreage of such reservations selected by the reservees upon and from lands so as aforesaid granted to your petitioner and the reasonable value thereof at the time of the selection by the reservees and the time of the execution by the United States of deeds or patents to the reservees.

Your petitioner files herewith as Exhibit No. 36 (Book of Exhibits, page 544) copies of the forms of the "homestead deeds" and the "allotment deeds" which the United States have executed and caused to be executed to the various allottees of lands in the Cherokee nation, and your petitioner asks that same be considered a part of this petition with the same effect as though herein incorporated and at length set out.

Your petitioner files herewith as Exhibit No. 37 (Book of Exhibits, page 548) copies of the forms of the "homestead deeds" and the "allotment deeds" which the United States have executed and caused to be executed to the various

allottees of lands in the Creek nation, and your petitioner asks that same be considered a part of this petition with the same effect as though herein incorporated and at length set out.

Your petitioner files herewith as Exhibit No. 38 (Book of Exhibits, page 556) copies of the forms of the "homestead deeds" and the "allotment deeds" which the United States have executed and caused to be executed to the various allottees of lands in the Choctaw and Chickasaw nations, and your petitioner asks that the same be considered a part of this petition with the same effect as though herein incorporated and at length set out.

Your petitioner files herewith as Exhibits 39, 40, and 41 (Book of Exhibits, pages 560, 562, and 564) copies of the forms of the "town-site deeds" which the United States have executed and caused to be executed to the various purchasers of town lots in Cherokee, Creek, Choctaw, and the Chickasaw nations, and your petitioner asks that the same be considered a part of this petition with the same effect as though herein incorporated and at length set out.

Your petitioner further states that town sites were laid out under the direction of the Secretary of the Interior of the United States and of the supervising engineer of the United States, and that after the plats of such town sites were prepared they were approved by the Secretary of the Interior. Thereafter the town lots and blocks constituting such town sites were appraised by Commissions appointed by the Secretary of the Interior of the United States and disposed of at prices fixed by the Secretary of the Interior, as in the various acts of Congress hereinbefore referred to provided. Your petitioner has not access to the various appraisements of the several town sites situated upon the odd-numbered sections so as aforesaid granted to your petitioner, as set forth in Exhibit 35 of the Book of Exhibits, p. 495, *et seq.*, or to the sales records showing the amounts for which the lots and blocks constituting the same have been sold,

and to what extent such lots and blocks constituting such town sites have been sold, but states that all papers and records showing such facts are in possession of the United States and on file in the office of the Secretary of the Interior, and your petitioner refers to the same and asks that the same be considered a part of this petition as though incorporated herein, and your petitioner further asks that the United States be required to file such records and papers or copies of the same in this cause.

Your petitioner further states that all of the expenses attendant upon the survey, platting, and sale of such town lots and blocks have been paid by the United States, and that such town lots and blocks have been sold to divers and sundry persons, irrespective of their citizenship or residence and irrespective of whether or not they were Indians by blood or former members of the Cherokee, Creek, Choctaw, or Chickasaw nations.

Your petitioner further states that in and by the acts of Congress hereinbefore referred to, and especially under the act of Congress relating to the allotment of lands in the Choctaw and Chickasaw nations, certain coal, asphalt, and mineral lands were reserved from allotment and provision made for the leasing and sale of such coal and asphalt lands. Your petitioner further shows that in and by said acts it is provided that the Secretary of the Interior shall by proper orders segregate such asphalt and coal lands from allotment, and that in pursuance of such acts the Secretary of the Interior has segregated from allotment certain asphalt and coal lands, and that certain of the odd-numbered sections described in Exhibit 43 are within the area of the land so segregated from allotment by the Secretary of the Interior as coal and asphalt lands. Your petitioner further states that there are on file in the office of the Secretary of the Interior the executive orders, files, and maps showing the lands so segregated and set apart as coal, asphalt, or mineral lands, and your petitioner hereby refers to the same and will at the

hearing hereof present such executive orders and records or duly exemplified copies thereof so as to specifically identify the odd-numbered sections so as aforesaid granted to your petitioner which have not been allotted, but have been set apart and segregated as asphalt, coal, and mineral lands, to be leased and sold by the Secretary of the Interior in the manner to be hereafter, and after the expiration of certain leases thereof, provided by the United States.

Your petitioner further alleges that the Cherokee, Creek, Choctaw, and Chickasaw tribes or nations do not exist as such in fact, but only *pro forma* and in contemplation of law, as will appear from the several acts of Congress hereinbefore referred to, and especially the act of April 26, 1906, entitled "*An act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes.*" In said act, among other things, it is provided that if the principal chiefs of the Cherokee, Creek, or Choctaw tribes, or the Governor of the Chickasaw tribe, shall refuse or neglect to perform any of the duties placed upon them or either of them by any of said acts of Congress, or shall fail or refuse or neglect, within thirty days after notice that any instrument, deed, or patent is ready for signature, to appear "at a place to be designated by the Secretary of the Interior and execute the same, such instrument may be approved by the Secretary of the Interior without such execution, and when so approved and recorded, shall convey legal title."

Your petitioner further shows that by the terms of the act of Congress of the United States last above referred to it is provided that when allotments shall be made in the Cherokee, Creek, Choctaw, or Chickasaw nations, as provided in the acts of Congress hereinbefore referred to, the residue of lands in each of said nations not reserved or otherwise disposed of will be sold by the Secretary of the Interior of the United States under rules and regulations to be prescribed by him, and the conveyances of such lands will be executed

in like manner and with like effect as in said act of April 26, 1906, provided for other conveyances.

Your petitioner further states, upon its best information and belief, that a small quantity of the lands described in Exhibit No. 43, being the odd-numbered sections so as aforesaid granted to your petitioner, have not been allotted, reserved, or otherwise disposed of, but the United States has announced its purpose through the Secretary of the Interior to, under the provisions of said act, sell and convey the same, as the public lands of the United States, to divers and sundry parties, in disregard of the grants of same to your petitioner.

Your petitioner refers to the records of the Commission to the Five Civilized Tribes and of the Commissioner to the Five Civilized Tribes, now on file in the office of the Secretary of the Interior, showing what, if any, lands so as aforesaid granted to your petitioner have not been sold, allotted, or otherwise reserved, and at the hearing hereof will present such records or duly exemplified copies thereof.

Your petitioner further states that in and by the terms of the act of Congress of the United States approved June 16, 1906, hereinbefore referred to, authorizing the people of the Oklahoma and Indian Territories to form a State, it is, among other things, expressly provided that nothing therein contained shall in any way affect the right of the Congress of the United States to hereafter pass such laws as, in its judgment, may be necessary for the disposition of lands in said Cherokee, Creek, Choctaw, and Chickasaw nations not previously disposed of. Your petitioner further shows that while in and by the terms of said act of the Congress of the United States of April 26, 1906, it is provided that the lands belonging to the Cherokee, Creek, Choctaw, and Chickasaw tribes upon the dissolution of said tribes "shall not become public lands or property of the United States, but shall be held in trust by the United States, for the use and benefit of the Indians respectively comprising each of said tribes, and their heirs, as the same shall appear

by the roll as finally concluded," said lands long prior to the passage of said act ceased to be the lands of the Cherokee, Creek, Choctaw, and Chickasaw nations, and became, notwithstanding the *ex post facto* legislative declaration of the Congress of the United States by said act of April 26, 1906, to the contrary, public lands of the United States, and the odd-numbered sections of such lands so remaining undisposed of, as well as all others lying within twenty miles of your petitioner's line of railway on either side thereof, passed to your petitioner under the grant between your petitioner and the United States aforesaid in and by virtue of the grant thereof by said act of July 25, 1866; but, notwithstanding your petitioner became the owner thereof and entitled to the same, as aforesaid, the United States has announced its purpose to and will dispose of said unallotted lands and otherwise-undisposed-of-lands as the public lands of the United States under the general laws of the Congress of the United States and with or without the consent of the said Cherokee, Creek, Choctaw, or Chickasaw nations or either of them, and in such way and in such manner as the United States by and through the Congress thereof may determine and see fit, and in substantially the same manner as all other public lands of the United States have been disposed of, thereby breaching the covenants of its grants to your petitioner.

Your petitioner shows that by an act of Congress entitled "An act to amend section 6, chapter 119, United States Statutes at Large, No. 24," approved March 3, 1901, every Indian in the Indian Territory was declared to be a citizen of the United States and entitled to all the rights, privileges, and immunities of such citizens (31 Stat. L., 1447).

Your petitioner further shows that in and by various acts of Congress of the United States hereinbefore referred to provision was made for the sale by the allottees of certain of their lands, except their homestead entries, under rules and regulations to be prescribed by the Secretary of the Interior, and under and pursuant to such acts of Congress

the Secretary of the Interior of the United States prescribed sundry rules and regulations covering the sale by the allottees of certain of their lands, and a great many of said allottees have exercised the rights and privileges purported to be conferred upon them by such laws, rules, and regulations and have sold portions of their allotments, including some of said odd-numbered sections and parts thereof so granted to your petitioner, as aforesaid, and the purchasers thereof or their vendees are now in possession of said lands; and your petitioner further shows that in and by virtue of said acts of Congress the deeds and patents executed thereunder by the United States, or which it has caused to be executed, the United States agreed to put all allottees in possession of the lands allotted to them, and agreed to protect the allottees of lands, purchasers of town-site lots, and the reservees of said lands, including the odd-numbered sections or parts thereof so as aforesaid granted to your petitioner, against the claims of your petitioner and all persons whomsoever, and to protect such allottees, purchasers, and reservees in the quiet and peaceable possession of said lands, and that thereby the United States has breached the covenants of its grants to your petitioner and is liable and has impliedly agreed to be liable to your petitioner for the full value of all of said odd-numbered sections and parts or portions thereof so granted to your petitioner by the United States.

Your petitioner further states that under the acts of Congress and treaties herein set forth respecting the selection and allotment and disposition of the lands in question to the individual members of the Cherokee, Creek, Choctaw, and Chickasaw nations and the sale of town lots in said nations, the said lands have been selected and allotted and sold at the land offices of the United States established in said Cherokee, Creek, Choctaw, and Chickasaw nations by practically the same method generally pursued by the United States in the disposition of its other public lands; that at

said land offices, plat and tract books were kept and the members and citizens of said nations, as citizens of the United States, made applications for said lands, and when their applications were allowed certificates of allotment were given to the applicants, and thereafter deeds or patents, signed by the Secretary of the Interior for and on behalf of the United States, were executed and delivered to the allottees, and that prior to the selection of said lands by the individual members and citizens of the several nations and others, said lands were surveyed and platted into townships, ranges, sections, and quarter sections and joined to the plats and surveys of the other public lands of the United States; that all of the expenses of such plattings and surveys were paid by the United States, as well as all the expenses attending the selections and applications for allotments of land, and that generally the same course was pursued as has been pursued by the United States respecting the disposition of other public lands of the United States, save that only those citizens of the United States who were or formerly were members and citizens of the Cherokee, Creek, Choctaw, and Chickasaw Indian nations, or others particularly named in the acts of Congress hereinbefore referred to as reservees, were permitted to homestead or become allottees or reservees of said lands, and that in many instances individual white people and negro freedmen, who are not or were not Indians by blood, were permitted to make selections of land and have allotments made to them. And your petitioner further shows that the town sites so as aforesaid located and laid out upon certain of the odd-numbered sections so as aforesaid granted to your petitioner were laid out, surveyed, platted, and sold by the United States and its agents in substantially the same manner that town sites are laid out and authorized to be laid out upon other public lands of the United States, in accordance with the general laws of the United States.

Your petitioner shows that on the faith of the contract between your petitioner and the United States so as aforesaid entered into, and the grant of lands made to it by the

United States in and by said acts of July 25 and 26, 1866 your petitioner undertook to and did construct its railway through the Indian Territory, notwithstanding the same at the time and for many years thereafter was free from settlement, except by bands or tribes of Indians, and afforded practically no traffic, freight or passenger, to your petitioner; and your petitioner states that at the time its line of railway was constructed through the Indian Territory—that is to say, in the years 1870, 1871, and 1872—the said Territory was practically a wilderness, and your petitioner attaches hereto, as Exhibit C, a map of said Territory, prepared in the year 1866 by the Government of the United States, to which reference is hereby made, and your petitioner asks that same be considered a part of this petition with like effect as though same was herein incorporated.

Your petitioner further states that upon the strength of the contract between the United States and your petitioner and the grant of lands, as aforesaid, to your petitioner in the Indian Territory, it secured additional subscribers to its capital stock and bonds, and the money thus secured was used in the construction of its said railroad through the Indian Territory and elsewhere; and your petitioner states that a pamphlet, with a map, Exhibit B, *supra*, attached showing your petitioner's line of railway and land grants, in the nature of a prospectus, was prepared by your petitioner in 1871 and generally distributed throughout the country, setting forth the grants so made by the United States to your petitioner for the construction of its line of railway in Kansas and through the Indian Territory and the grants of lands thereunder.

Your petitioner further shows that as a result of the construction of your petitioner's line of railway through the Indian Territory the even-numbered sections of land adjacent to the odd-numbered sections of land so granted to your petitioner, as aforesaid, became, were, and are of more value than both the even and odd numbered sections would

have been but for the construction, maintenance, and operation of your petitioner's railway.

Your petitioner further states that for many years after the construction of your petitioner's line of railway through the Indian Territory said Territory remained uncultivated and unproductive of local traffic, by reason of its sparse settlement, and that your petitioner could not and would not have constructed said line but and except for the land grant so made as aforesaid by the United States to your petitioner and the grant of land pursuant thereto, because the money to build the same could never have been secured at that early day except upon the faith of such grant.

Your petitioner further shows that in every respect it has complied with its obligations as to the building, maintenance, and operation of its said railway through the Indian Territory, but that the United States, contrary to its obligations and in violation of its said contract with your petitioner, and contrary to its covenants in said grant of said odd-numbered sections of land in the Indian Territory to your petitioner, and contrary to equity and good conscience, breached its said contract and covenants with your petitioner and its obligations and grants under said contract and said act of Congress of July 25, 1866, by deeding and causing to be deeded said lands to allottees, reservees, and purchasers as herein recited. Your petitioner states that the value of the odd-numbered sections and parts thereof so granted to your petitioner as aforesaid and listed in the schedule, Exhibit No. 43, was at the time of the extinguishment of the Indian title by the execution of the deeds by the United States, as aforesaid, to allottees, reservees, and vendees, twenty dollars per acre for the entire odd-numbered sections or parts thereof lying within twenty miles on each side of your petitioner's line of railway through the Indian Territory, or an aggregate value of $61,287,800.00.

Your petitioner further shows that on the 30th of April, 1906, the State of Kansas, at the request and upon the peti-

tion of your petitioner, instituted an original suit in the Supreme Court of the United States against the United States, the Secretary of the Interior, the Commissioner of the General Land Office, and certain Indian allottees and vendees of such allottees, to recover, as trustee for your petitioner, the lands granted to your petitioner in the Indian Territory by its land grants, and subsequently, on February 23, 1907, on motion of the United States and other defendants, the said suit was dismissed for want of original jurisdiction, and without reference to the merits of the controversy raised by the bill, the Supreme Court holding that the land grant in the Indian Territory was in effect a grant direct to your petitioner, in which the State of Kansas had no substantial interest, but was, if anything, only a trustee of the naked title, and on the further ground that the United States had not given its consent to be sued in the Supreme Court as a court of original jurisdiction, and therefore could not be sued in that case in that court. The court, however, held in that case, as shown by its opinion, a copy of which is filed herewith as Exhibit No. 44 (Book of Exhibits, p. 612), that the United States was the real party defendant, and that if the allotments should be taken from the individual Indians and those claiming under them, which was part of the relief sought by the bill, the United States would be subject to a demand from them for the value thereof or for other lands. Your petitioner avers that it is advised and believes, and asserts the fact to be, that the United States, being the party ultimately in interest, is directly responsible to your petitioner in this court for the breach of the covenants of its grant whereby the granted lands have been patented and are being patented to other parties than your petitioner, and that your petitioner is entitled to recover directly in this suit a judgment for the value of the granted lands which have been patented to other parties and which, but for the breach of the covenants of the United States, should have been patented to your petitioner.

Your petitioner, in conclusion, charges, by way of summary of the allegations herein contained, that the Congress of the United States granted to your petitioner all of the odd-numbered sections of land within the twenty-mile limits along the line of its railroad as located and constructed through the Indian Territory from the southern boundary of the State of Kansas to the northern boundary line of the State of Texas; that by the terms of section 9 of the act of Congress of July 25, 1866, it was provided—

> "*And be it further enacted*, That the same grants of lands through the Indian Territory are hereby made as provided in the first section of this act, whenever the Indian title shall be extinguished by treaty or otherwise, not to exceed the ratio per mile granted in the first section of this act: *Provided*, That said lands become a part of the public lands of the United States."

and by the first section of said act it was provided—

> "There is hereby granted to the State of Kansas, for the use and benefit of said railroad company, every alternate section of land or parts thereof, designated by odd numbers, to the extent of ten sections per mile on each side of said road, to be selected within twenty miles from the line of said road;"

and in case there was a deficiency in said grant of odd-numbered sections, owing to the reservations by the United States for any purpose whatever, then there was granted even-numbered sections within said twenty-mile limits in lieu of such odd-numbered sections, in such an amount as to make a full grant of twenty sections per mile along said railroad as definitely located and constructed. Your petitioner further shows that, having obtained the authority of the Creek, Cherokee, Choctaw, and Chickasaw nations and of the President of the United States and the Secretary of the Interior, it built its railroad across the Indian Territory

within the time required by said act and upon the route authorized by the United States and the Indian nations; that it completed the construction of its railroad in 1872 and has ever since maintained and operated the same; that by the building of its road it earned the grants, and has ever since asserted, in various ways and at all proper times, its claim to said grants.

Your petitioner shows that the United States held the paramount title to said lands as public lands of the United States, subject only to the extinguishment of the Indian title, and that before the Indian title came into existence the said lands were public lands of the United States, having been granted to it by the treaty with France whereby the Louisiana Territory was purchased, and that the Indian title has been extinguished; that upon the extinguishment of such Indian title the said lands so granted to your petitioner remained, as before, a part of the public lands of the United States, and were by said act of Congress of the United States of July 25, 1866, granted to your petitioner. Your petitioner shows that it was the duty of the United States, upon the extinguishment of the Indian title, to have recognized and enforced its grants to your petitioner, as it had solemnly covenanted to do, by setting aside to it the granted lands and to cause certificates or patents to be issued to it for such lands. Your petitioner says that when said lands covered by its land grants were surveyed and the sections identified by number, range, and township, as other public lands of the United States, then the grants of said lands to your petitioner specifically attached to the odd-numbered sections within the granted limits, and in case of deficiency to the even-numbered sections within said limits necessary to make up such deficiency; that when said surveys were made and the grants to your petitioner made specific, and when the Indian title was extinguished, the said lands granted became a part of the public lands of the United States and were granted to your petitioner as aforesaid.

Your petitioner shows that by the failure and refusal of the United States to recognize the land grants to your petitioner upon the extinguishment of the Indian title and to cause the lands granted to be certified and patented to your petitioner, and that by the acts of Congress of the United States and of the executive department thereof in setting aside and conveying said granted lands to other persons, the United States broke the covenants contained in its land grants and became liable to your petitioner for damages for the violation of the covenants of said grants for the value of the granted lands. Your petitioner states that it is advised and believes that upon the extinguishment of the Indian title it then became entitled to the possession of the lands granted and to the title of the lands granted by relation as from the date of the grant, but at all events avers that it became entitled to the lands granted as from the date of the extinguishment of the Indian title; that the extinguishment of the Indian title to the lands granted has been within less than six years last past, and that such extinguishment was effected by patents or deeds to allottees, purchasers, and others. Your petitioner shows that, by reason of the breaches of the covenants of the United States contained in its land grants to your petitioner as aforesaid and of the future breaches thereof which it has determined to make by conveying any of the lands now unallotted or any of the town sites now unsold to allottees, purchasers, and others, the United States has broken the covenants of the grants to your petitioner, and your petitioner is entitled in this action to recover as for a breach by the United States of the entire covenants contained in its land grants to your petitioner.

Your petitioner states that it is the owner of the claim herein sued upon, and that no other person or parties are interested therein, and that no assignment or transfer of said claim or any part thereof or any interest therein has been made, and that the claimant is justly entitled to the amount herein claimed from the United States after allowing all just

credits and offsets, and that the claimant is a resident of the State of Kansas and a citizen of said State and a citizen of the United States.

Wherefore, the premises considered, your petitioner prays that an account may be taken, ascertaining the extent of its land grants from the United States in the Indian Territory under the act of Congress of July 25, 1866; the number of acres contained therein; the value of such lands at the date of the extinguishment of the Indian title by deeding and patenting the lands to others than your petitioner; what lands have been allotted, what lands are to be allotted, what lands have been sold as town sites and what remain to be sold and the value thereof, what granted lands, if any there are, to which the Indian title has not been extinguished, and what of the granted lands have been reserved from allotment; and for such other and further relief as it is competent for a court of equity to give, and finally for a judgment against the United States of America for sixty-one million, two hundred and eighty-seven thousand, eight hundred ($61,287,800) dollars.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY,
By ADRIAN H. JOLINE, *President.*

Attest:
C. N. WHITEHEAD, *Secretary.*

JAMES HAGERMAN,
General Counsel and Attorney of Record for Petitioner.

JOSEPH H. CHOATE,
ADRIAN H. JOLINE,
A. B. BROWNE,
JOSEPH M. BRYSON,
Of Counsel.

THE UNITED STATES OF AMERICA,
State and City of New York, ss:

Charles G. Hedge, being duly sworn, upon his oath states that he is vice-president of the Missouri, Kansas and Texas Railway Company, petitioner in the above and foregoing cause, and is duly authorized to make the verification to this petition; that he has carefully read the above and foregoing petition, and in connection with the general counsel of the petitioner has reviewed the history of the land grants referred to in the petition and the records of the petitioner and of the United States relating thereto, and the statements therein contained, so far as within his personal knowledge, are true, and those stated on information and belief he verily believes to be true, and this affiant files with this petition, as a part thereof, power of attorney, duly executed by the Missouri, Kansas and Texas Railway Company, petitioner, authorizing him to make this verification.

CHAS. G. HEDGE.

Subscribed and sworn to before me, this 13th day of May, 1907.

My commission as notary public expires on the 30th day of March, 1908.

Charles H. Hanson
New York Co. Notary Public. 26

Know all men by these presents that

WHEREAS the undersigned Missouri, Kansas and Texas Railway Company, a corporation duly chartered, organized, and existing under the laws of the State of Kansas, is about to bring a suit in the Court of Claims of the United States, at Washington, against the United States for the breach of

the covenants of its land grants through the Indian Territory:

Now, THEREFORE, the said Missouri, Kansas and Texas Railway Company does hereby make, constitute, and appoint Charles G. Hedge, of New York, vice-president of said company, its true and lawful attorney-in-fact to make the verification to the petition to be filed in said cause and to be annexed to the said petition and filed therewith.

IN WITNESS WHEREOF the Missouri, Kansas and Texas Railway Company has caused this instrument to be signed by its president and attested by its secretary, and its corporate seal to be thereunto affixed this 1st day of May, 1907.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY,

[SEAL.] By ADRIAN H. JOLINE, *President.*

Attest:

C. N. WHITEHEAD, *Secretary.*

Address of claimant: 49 Wall St., New York city.

JAMES HAGERMAN,

Attorney and General Counsel, St. Louis, Mo.

MAPS

TOO

LARGE

FOR

FILMING

EXHIBIT 1

TREATY

CEDING LOUISIANA TO THE UNITED STATES, WHICH INCLUDED OKLAHOMA AND THE INDIAN TERRITORY.

The President of the United States of America, and the first consul of the French republic, in the name of the French people, desiring to remove all source of misunderstanding relative to objects of discussion mentioned in the second and fifth articles of the convention of (the 8th Vendemiaire, an 9) 30th September, 1800, relative to the rights claimed by the United States, in virtue of the treaty concluded at Madrid the 27th of October, 1795, between his Catholic majesty and the said United States, and willing to strengthen the union and friendship which at the time of said convention was happily re-established between the two nations, have respectively named their plenipotentiaries, to-wit: The President of the United States of America, by and with the advice and consent of the senate of the said states: Robert R. Livingston, minister plenipotentiary of the United States, and James Monroe, minister plenipotentiary and envoy extraordinary of the said states, near the government of the French republic, and the first consul, in the name of the French people, the French citizen, Barbe Marbois, minister of the public treasury, who, after having respectively exchanged their full powers, have agreed to the following articles:

ARTICLE I.

Whereas, By the article the third of the treaty concluded at St. Idlefonso (the 9th Vendemiaire, an 9), 1st October, 1800, between the first consul of the French republic and his catholic majesty, it was agreed as follows: "His catholic majesty promises and engages on his part, to cede to the French republic, six months after the full and entire execution of the conditions and stipulations herein relative to his royal highness the Duke of Parma, the colony or province of Louisiana, with the same extent that it now has in the hands of Spain, and that it had when France possessed it; and such as it should be after the treaties subsequently entered into between Spain and other states." And whereas, in pursuance of the treaty, and particularly of the third article, the French republic has an incontestable title to the domain and to the possession of the said territory. The first consul of the French republic desiring to give to the United States a strong proof of his friendship, doth hereby cede to the said United States, in the name of the French republic, forever and in full sovereignty, the said territory, with all its rights and appurtenances, as fully and in the same manner as they might have been acquired by the French republic in virtue of the above mentioned treaty, concluded with his catholic majesty.

ARTICLE II.

In the cession made by the preceding article are included the adjacent islands belonging to Louisiana, all public lots and squares, vacant lands, and all public buildings, fortifications, barracks and other edifices which are not private property. The archives, papers and documents relative to the domain and sovereignty of Louisiana, and its dependencies, will be left in the

possession of the commissaries of the United States, and copies will be afterwards given in due form to the magistrates and municipal officers of such of the said papers and documents as may be necessary to them.

ARTICLE III.

The inhabitants of the ceded territory shall be incorporated in the union of the United States, and admitted as soon as possible, according to the principles of the federal constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States; and in the meantime, they shall be maintained and protected in the free enjoyment of their liberty, property and the religion which they profess.

ARTICLE IV.

There shall be sent by the government of France a commissary to Louisiana, to the end that he do every act necessary, as well as to receive from the officers of his catholic majesty of the said country and its dependencies, in the name of the French republic, if it has not been already done, as to transmit it in the name of the French republic to the commissary or agent of the United States.

ARTICLE V.

Immediately after the ratification of the present treaty by the President of the United States, and in case that of the first consul shall have been previously obtained, the commissary of the French republic shall remit all the military posts of New Orleans, and other parts of the ceded territory, to the commissary or commissaries named by the President to take possession; the troops either of France or Spain who may be there, shall cease to occupy any military post from the time of taking

possession, and shall be embarked as soon as possible, in the course of three months after the ratification of this treaty.

ARTICLE VI.

The United States promise to execute such treaties and articles as may have been agreed betwee Spain and the tribes and nations of Indians, until by mutual consent of the United States and the said tribes or nations, other suitable articles shall have been agreed upon.

ARTICLE VII.

As it is reciprocally advantageous to the commerce of France and the United States to encourage the communication of both nations for a limited time in the country ceded by the present treaty, until general arrangements relative to the commerce of both nations may be agreed on; it has been agreed between the contracting parties, that the French ships coming directly from France or any of her colonies, loaded only with the produce or manufactures of France or her said colonies, and the ships of Spain coming directly from Spain or any of her colonies, loaded only with the produce or manufactures of Spain or her colonies, shall be admitted during the space of twelve years in the ports of New Orleans, and in all other legal ports of entry within the ceded territory, in the same manner as the ships of the United States, coming directly from France or Spain, or any of their colonies without being subject to any other or greater duty on merchandise, or greater tonnage than those paid by the citizens of the United States.

During the space of time above mentioned, no other nation shall have a right to the same privileges in the ports of the ceded territory; the twelve years shall commence three months after the exchange of ratifications, if it shall take place in France, or three months after it

shall have been notified at Paris to the French government, if it shall take place in the United States; it is, however, well understood, that the object of the above article is to favor the manufactures, commerce, freight and navigation of France and Spain, so far as relates to the importations that the French and Spanish shall make into the said ports of the United States, without in any sort affecting the regulations that the United States may make concerning the exportation of the produce and merchandise of the United States, or any right they may have to make such regulations.

ARTICLE VIII.

In future and forever after the expiration of the twelve years, the ships of France shall be treated upon the footing of the most favored nations in the ports above mentioned.

ARTICLE IX.

The particular convention signed this day by the respective ministers, having for its object to provide for the payment of debts due to the citizens of the United States by the French republic, prior to the 30th of September, 1800 (8th Vendemiaire, 9), is approved, and to have its execution in the same manner as if it had been inserted in the present treaty, and it shall be ratified in the same form and in the same time, so that the one shall not be ratified distinct from the other.

Another particular convention, signed at the same date as the present treaty, relative to a definite rule between the contracting parties, is in the like manner approved, and will be ratified in the same form, and in the same time, and jointly.

ARTICLE X.

The present treaty shall be ratified in good and due form, and the ratifications shall be exchanged in the space of six months after the date of the signature by the ministers plenipotentiary, or sooner if possible.

In faith whereof, the respective plenipotentiaries have signed these articles in the French and English languages, declaring, nevertheless, that the present treaty was originally agreed to in the French language; and have thereunto put their seals.

Done at Paris, the tenth day of Floreal, in the eleventh year of the French republic, and the 30th April, 1803.

ROBERT R. LIVINGSTON, (L. S.)
JAMES MONROE, (L. S.)
BARBE MARBOIS, (L. S.)

EXHIBIT 2

ACT OF CONGRESS, JULY 25, 1866.

AN ACT GRANTING LANDS TO THE STATE OF KANSAS TO AID IN THE CONSTRUCTION OF THE KANSAS AND NEOSHO VALLEY RAILROAD AND ITS EXTENSION TO THE RED RIVER.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of aiding the Kansas and Neosho Valley Railroad Company, the same being a corporation organized under the laws of the State of Kansas, to construct and operate a railroad from the eastern terminus of the Union Pacific Railroad, Eastern Division, at the line between Kansas and Missouri, at or near the mouth of the Kansas River, on the south side thereof, southwardly, through the eastern tier of counties in Kansas, with a view of its extension, so as to effect a junction at Red River with a railroad now being constructed from Galveston to Red River at or near Preston, in Texas, there is hereby granted to the State of Kansas, for the use and benefit of said Railroad Company, every alternate section of land or parts thereof, designated by odd numbers, to the extent of ten sections per mile on each side of said road to be selected within twenty miles from (of) the line of said road; but in case it shall appear that the United States have, when the line of said road is definitely located, sold any section, or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes afore-

said, from the public lands of the United States nearest to the sections above specified, so much land as shall be equal to the amount of such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached as aforesaid, which lands, thus indicated by the direction of the Secretary of the Interior, shall be reserved and held for the State of Kansas for the use of said Company by the said Secretary for the purpose of the construction and operation of said railroad, as provided by this act: Provided, That any and all lands heretofore reserved to the United States by any Act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby, reserved and excepted from the operation of this act, except so far as it may be found necessary to locate the route of said road through such reserved lands, in which case the right of way two hundred feet in width is hereby granted, subject to the approval of the President of the United States: And provided, further, That none of the lands hereby granted shall be selected beyond tweny miles from the said road.

"Sec. 2. And be it further enacted, That the sections and parts of sections of land which by the aforesaid grant shall remain in the United States, within ten miles on each side of said road, shall not be sold for less than double the minimum price of public lands when sold, nor shall any of said lands become subject to sale at private entry until the same shall have been first offered at public sale to the highest bidder, at or above the minimum price aforesaid: Provided, That actual bona fide settlers under the pre-emption laws of the United States may, after due proof of settlement, improvement, and occupation, as now provided by law, purchase the same

at the price fixed for said lands at the date of such settlement, improvement, and occupation. And provided also, That settlers under the provisions of the Homestead act, who make their settlement after the passage of this act, and comply with the terms and requirements of said act, shall be entitled, within the said limits of ten miles, to patents for an amount not exceeding eighty acres each.

"Sec. 3. And be it further enacted, that the grant of lands hereby made is upon condition that said Company, after the construction of its road, shall keep it in repair and use and that (it will) at all times be in readiness to transport troops, munitions of war, supplies and public stores upon its road for the government, when required to do so by any department thereof, at the cost, charge, and expense of said Company. And the lands hereby granted, held, and reserved as aforesaid shall inure to the benefit of said Company, as follows: When the Governor of the State of Kansas shall certify that any section of ten consecutive miles of said road is completed in a good, substantial, and workmanlike manner as a first-class railroad, then the said Secretary of the Interior shall issue to the said Company patents for so many sections of the lands within the limits above named as are co-terminous with said completed section hereinbefore granted; and when certificates of the Governor aforesaid shall be presented to said Secretary, of the completion, as aforesaid, of each successive section of ten consecutive miles of said road, the said Secretary shall in like manner issue to said Company patents for the land for each of said sections of road as in the first instance, until said road shall be completed: Provided, That if said road is not completed within ten years from the date of the acceptance of the grant hereinbefore made, the lands remaining unpatented shall revert to

the United States: And provided further, That the said lands shall not, in any manner, be disposed of or incumbered by said company or its assigns, except as the same are patented under the provisions of this act.

"Sec. 4. And be it further enacted, That as soon as said Company shall file with the Secretary of the Interior maps of its line, designating the route thereof, it shall be the duty of the said Secretary to withdraw from the market the lands granted by this act, in such manner as may be best calculated to effect the purposes of this act and subserve the public interest.

"Sec. 5. And be it further enacted, That the United States mail shall be transported on said road and its extension, under the direction of the Post Office Department, at such price as Congress may by law provide: Provided, That until such price is fixed by law, the Postmaster General shall have power to fix the compensation.

"Sec. 6. And be it further enacted, That the right of way through the public lands be, and the same is hereby, granted to said Kansas and Neosho Valley Railroad Company, its successors and assigns, for the construction of a railroad as proposed; and the right is hereby given to said corporation to take from the public lands adjacent to the line of said road material for the construction thereof. Said way is granted to said railroad to the extent of one hundred feet in width on each side of said road, where it may pass through the public domain; also all necessary ground for station buildings, workshops, depots, machine shops, switches, side-tracks, turntables and water stations.

"Sec. 7. And be it further enacted, That the acceptance of the terms, conditions, and impositions of this act by the said Kansas and Neosho Valley Railroad Company shall be signified in writing, under the corpor-

ate seal of the said company, duly executed pursuant to the direction of its Board of Directors first had and obtained, which acceptance shall be made within one year after the passage of this act, and not afterwards, and shall be deposited with the Secretary of the Interior.

"Sec. 8. And be it further enacted, That said Kansas and Neosho Valley Railroad Company, its successors and assigns, is hereby authorized and empowered to extend and construct its railroad from the southern boundary of Kansas south, through the Indian Territory, to Red River, at or near Preston, in the State of Texas, so as to connect with the railway now being constructed from Galveston to a point at or near Preston, in said State, and the right of way through the Indian Territory, wherever such right is now reserved or may hereafter be reserved to the United States by treaty with the Indian tribes, is hereby granted to said Company, to the same extent as granted by the sixth section of this act, through the public lands: and in all cases where the right of way, as aforesaid, through the Indian lands shall not be reserved to the Government, the said Company shall, before constructing its road, procure the consent of the tribe or tribes interested, which consent, with all its terms and conditions, shall be previously approved and endorsed by the President and filed with the Secretary of the Interior.

"Sec. 9. And be it further enacted, That the same grants of lands through the Indian Territory are hereby made as provided in the first section of this act, whenever the Indian title shall be extinguished by treaty or otherwise, not to exceed the ratio per mile granted in the first section of this act. Provided, That said lands become a part of the public lands of the United States.

"Sec. 10. And be it further enacted, That said Kansas and Neosho Valley Railroad Company, its succes-

sors and assigns, shall have the right to negotiate with, and acquire from any Indian Nation or Tribe, authorized by the United States to dispose of lands for railroad purposes, and from any other Nation or Tribe of Indians through whose lands said railroad may pass, subject to the approval of the President of the United States, or from any Company or parties incorporated or authorized for such purposes, by such Nation or Tribe, or which such parties may have acquired under the laws of the United States.

"Sec. 11. And be it further enacted, That any railroad company chartered under any law of the United States, or of the State of Kansas, which may have been heretofore or shall hereafter be recognized and subsidized by any act of the Congress of the United States, may connect, unite, and consolidate with this Railroad Company, after the same shall be located to the valley of the Neosho River, upon just, fair, and equitable terms, to be agreed upon between the parties, and shall not be against the public interest or the interest of the United States; nor shall any road authorized to connect as aforesaid charge the road so connecting a greater tariff per mile for freight or passengers than is charged for the same per mile by its own road: And provided further, That should the Leavenworth, Lawrence and Fort Gibson Railroad Company, or the Union Pacific Railroad Company, Southern Branch, construct and complete its road to that point on the southern boundary of the State of Kansas where the line of said Kansas and Neosho Valley Railroad shall cross the same, before the said Kansas and Neosho Valley Railroad Company shall have constructed and completed its said road to said point, then and in that event the company so first reaching in completion the said point on the southern boundary of the State of Kansas shall be authorized,

upon obtaining the written approval of the President, of the United States, to construct and operate its line of railroad from said point to a point at or near Preston, in the State of Texas, with grants of land according to the provisions of this act, but upon the further special condition, nevertheless, that said railroad company shall have commenced in good faith the construction thereof before the said Kansas and Neosho Valley Railroad Company shall have completed its said railroad to said point: And provided further, That said other railroad company, so having commenced said work in good faith, shall continue to prosecute the same with sufficient energy to insure the completion of the same within a reasonable time, subject to the approval of the President of the United States: And provided, further, That the right of way through private property, when not otherwise provided for in this act, or by the law of any State through which the road may pass, shall be obtained by said Kansas and Neosho Valley Railroad Company, or either of the other companies named in this act, in accordance with the provisions of section three of an act to amend an act entitled 'An Act to aid in the construction of a Railroad and Telegraph Line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for Postal, Military and other purposes,' approved July first, eighteen hundred and sixty-two."

EXHIBIT 3

ACT. OF CONGRESS, JULY 26, 1866.

AN ACT GRANTING LANDS TO THE STATE OF KANSAS TO AID IN THE CONSTRUCTION OF A SOUTHERN BRANCH OF THE UNION PACIFIC RAILWAY AND TELEGRAPH, FROM FORT RILEY, KANSAS, TO FORT SMITH, ARKANSAS.

"Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That for the purpose of aiding the Union Pacific Railroad Company, Southern Branch, the same being a corporation organized under the laws of the State of Kansas to construct and operate a railroad from Fort Riley, Kansas, or near said military reservation, thence down the valley of the Neosho River to the southern line of the State of Kansas, with a view to an extension of the same through a portion of the Indian Territory to Fort Smith, Arkansas, there is hereby granted to the State of Kansas, for the use and benefit of said Railroad Company every alternate section of land or parts thereof designated by odd numbers, to the extent of five alternate sections per mile on each side of said road, and not exceeding in all ten sections per mile; but, in case it shall appear that the United States have, when the line of said road is definitely located, sold any section, or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid, from the public lands of the United States nearest to the sections above specified, so much land as shall be equal to the

amount of such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached as aforesaid, which lands, thus indicated by the direction of the Secretary of the Interior, shall be reserved and held for the State of Kansas for the use of said Company by the said Secretary, for the purpose of the construction and operation of said railroad, as provided by this Act: Provided, That any and all lands heretofore reserved to the United States by any Act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby, reserved and excepted from the operation of this Act, except so far as it may be found necessary to locate the route of said road through such reserved lands, in which case the right of way, two hundred feet in width, is hereby granted, subject to the approval of the President of the United States: And provided, further, That said lands hereby granted shall not be selected beyond twenty miles from the line of said road.

"Sec. 2. And be it further enacted, That the sections and parts of sections of land which by the aforesaid grant shall remain in the United States, within ten miles on each side of said road, shall not be sold for less than double the minimum price of public lands when sold: Provided, That actual bona fide settlers under the pre-emption laws of the United States may, after due proof of settlement, improvement, and occupation, as now provided by law, purchase the same at the price fixed for said lands at the date of such settlement, improvement, and occupation: Provided, also, That settlers under the provisions of the Homestead Act, who make their settlement after the passage of this Act and comply with the terms and requirements of said Act,

shall be enitled, within the said limits of ten miles, to patents for an amount not exceeding eighty acres each.

"Sec. 3. And be it further enacted, That the grant of lands hereby made is upon condition that said Company, after the construction of its road, shall keep it in repair and use, and shall at all times transport troops, munitions of war, supplies, and public stores upon its road for the Government of the United States, free from all cost or charge therefor to the Government, when required to do so by any Department thereof. And the lands hereby granted shall inure to the benefit of said Company as follows: When the Governor of the State of Kansas shall certify that any section of ten consecutive miles of said road is completed in a good, substantial and workmanlike manner, as a first class railroad, then the said Secretary of the Interior shall issue to the said Company patents for so many sections of the land herein granted within the limits above named, and co-terminous with said completed section hereinbefore granted; and when certificates of the Governor aforesaid shall be presented to said Secretary of the completion, as aforesaid, of each successive section of ten consecutive miles of said road, the said Secretary shall in like manner issue to said Company patents for the land for each of said sections of road as in the first instance, until said road shall be completed: Provided, That if said road is not completed within ten years from the date of the acceptance of the grant hereinbefore made, the lands remaining unpatented shall revert to the United States.

"Sec. 4. And be it further enacted, That as soon as said Company shall file with the Secretary of the Interior, maps of its line, designating the route thereof, it shall be the duty of said Secretary to withdraw from the market the lands granted by this Act, in such man-

ner as may be best calculated to effect the purposes of this Act and subserve the public interest.

"Sec. 5. And be it further enacted, That the United States mail shall be transported on said road, and under the direction of the Post Office Department, at such price as Congress may by law provide: Provided, That until such price is fixed by law the Postmaster General shall have power to fix the compensation.

"Sec. 6. And be it further enacted, That the right of way through the public lands be, and the same is hereby, granted to said Pacific Railroad Company, Southern Branch, its successors and assigns, for the construction of a railroad as proposed; and the right is hereby given to said corporation to take from the public lands adjacent to the line of said road material for the construction thereof. Said way is granted to said railroad to the extent of one hundred feet in width on each side of said road where it may pass through the public domain; also all necessary ground for station buildings, workshops, depots, machine shops, switches, sidetracks, turntables and water stations.

"Sec. 7. And be it further enacted, That the acceptance of the terms, conditions and impositions of this Act by the said Pacific Railroad Company, Southern Branch, shall be signified in writing, under the corporate seal of the said Company, duly executed pursuant to the direction of its board of directors first had and obtained, which acceptance shall be made within one year after the passage of this Act, and not afterwards, and shall be deposited with the Secretary of the Interior.

"Sec. 8. And be it further enacted, That said Pacific Railroad Company, Southern Branch, its successors and assigns, is hereby authorized and empowered to extend and construct its railroad from the southern boundary of Kansas, south through the Indian Territory, with the

consent of the Indians, and not otherwise, along the valley of Grand and Arkansas Rivers, to Fort Smith, in the State of Arkansas; and the right of way through said Indian Territory is hereby granted to said Company, its successors and assigns, to the extent of one hundred feet on each side of said road or roads, and all necessary ground for stations, buildings, workshops, machine shops, switches, side tracks, turntables and water stations.

"Sec. 9. And be it further enacted, That the same grant (s) of lands through said Indian Territory are hereby made as provided in the first section of this act, whenever the Indian title shall be extinguished by treaty or otherwise, not to exceed the ratio per mile granted in the first section of this Act: Provided, That said lands become a part of the public lands of the United States.

"Sec. 10. And be it further enacted, That said Pacific Railroad Company, Southern Branch, its successors and assigns, shall have the right to negotiate with, and acquire title to land for railroad purposes from, any Indian Nation or Tribe authorized by the United States to dispose of lands, and from any other Nation or Tribe of Indians through whose lands said railroad may pass, subject to the approval of the United States, or from any company or parties incorporated or authorized for such purposes, by such Nation or Tribe, or which such parties may have acquired under the laws of the United States.

"Sec. 11. And be it further enacted, That any railroad company chartered under any law of the United States, or of any State which may have been heretofore or shall hereafter be organized by any act of Congress of the United States, may connect, unite, and consolidate with this railroad company, after the same shall be located to the valley of the Neosho or Grand River,

upon just, fair, and equitable terms, to be agreed upon between the parties, as shall not be against the public interest, or the interest of the United States."

EXHIBIT 4

REPORT OF THE SECRETARY OF THE INTERIOR OF MAY 21, 1870, TO THE PRESIDENT OF THE UNITED STATES, THAT THE KANSAS AND NEOSHO VALLEY RAILROAD COMPANY WAS NOT AUTHORIZED TO ENTER THE INDIAN TERRITORY AND BUILD THE TRUNK LINE PROVIDED FOR IN THE ACT OF CONGRESS OF JULY 25, 1866, BUT THAT THE LINE OF RAILWAY OF THE UNION PACIFIC RAILWAY COMPANY, SOUTHERN BRANCH, SINCE RE-NAMED THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY, WAS IN SUBSTANTIAL ACCORD WITH THE SCHEME FIXED BY THE ACT OF CONGRESS AND TREATIES.

"Department of the Interior,
"Washington, D. C., May 21, 1870.

"Sir: On the 13th instant, upon a complaint filed in this department by the duly authorized delegates of the Cherokee Nation, averring that parties alleging themselves to be working parties of the Southern Branch Union Pacific Railway Company, had entered the Cherokee country, and were employed in grading a line for a railway, the officers of said railway company were notified by this department that the Cherokee Indians did not recognize their right to intrude upon their territory, and that no work of the kind referred to could be permitted therein until the Executive should be satisfied by evidence submitted through this department that such entry and occupation was in accordance with law. A similar notice had been given on the 27th ultimo to the officers of the Kansas and Neosho Valley Railway Company, who were reported to have entered the Quapaw reservation, near the town of Baxter, in southeastern Kansas.

"On Wednesday, the 18th instant, the said Southern Branch Union Pacific Railway Company appeared by their counsel, and moved for the revocation of said notification and order with respect to them, and the Cherokees, the Creeks, the Kansas and Neosho Valley Railroad Company, the Leavenworth, Lawrence and Fort Gibson Railroad Company, and the Atlantic and Pacific Railroad Company, appeared by Counsel to represent their several interests in the questions involved.

"The point submitted for the consideration of the department and for your determination is, what rights have been given to railroad companies to construct railroads through the Indian Territory, and what railroads, if any, are entitled to such privileges and right of way?

"In the year 1866 a series of treaties were negotiated with the Cherokees, the Creeks, the Choctaws, the Chickasaws, and the Seminole Indians, in which stipulations were made permitting railroads to be constructed in the Indian Territory. At the same time laws were enacted by Congress authorizing the several railroad companies named, under certain conditions, to approach the boundary of the Indian country on the north or on the east, with a view to the construction of, at least, one railway from north to the south through the Indian Territory, from Kansas to Eastern Texas, and at least one railway through the Indian Territory, from east to west, from Missouri or Arkansas, to northern Texas.

"On the part of the Indians it is claimed that the whole scheme of treaties and of legislation looked to the construction of but a single trunk road through the Territory from north to south, and, so far as the Cherokee Nation is concerned, for the like construction of but a single road through its territory, from east to west.

"On the part of the Kansas & Neosho Valley road, the Leavenworth, Lawrence and Fort Gibson road, and the

Atlantic and Pacific road, the interpretation given by the Indians to the treaties and laws was admitted to be the correct one. The Southern Branch Union Pacific Company denied that interpretation, and insisted that the meaning of the legislation and of the treaties was to give the right of way to as many roads as might in any manner be authorized by Congress to enter the Territory. It was admitted by all parties that the Acts of Congress of July 25, 26 and 27, 1866, granting lands and privileges to the Kansas and Neosho road, the Southern Branch Union Pacific road and the Atlantic and Pacific road, respectively, and the several Indian treaties referred to, were all essentially parts of the same transaction, and were to be taken and construed together for the purpose of determining the scheme which was intended to be legalized by Congress.

"The Act granting lands for the Kansas and Neosho Valley road declared that it was to aid said company 'to construct and operate a railroad from the eastern terminus of the Union Pacific Railroad, Eastern Division, at the line between Kansas and Missouri, at or near the mouth of the Kansas River, on the south side thereof, southwardly, through the eastern tier of counties in Kansas, with a view of its extension, so as to effect a junction at Red River with a railroad now being constructed from Galveston to Red River, at or near Preston, in Texas.' Section eight of that Act authorized said company 'to extend and construct its railroad from the southern boundary of Kansas south, through the Indian Territory, to Red River, at or near Preston, in the State of Texas,' and gave 'the right of way through the Indian Territory, wherever such right is now reserved, or may hereafter be reserved to the United States by treaty with the Indian tribes,' and wherever such right of way should not be reserved, the consent of the

Indian tribes interested was declared to be necessary, which consent, with all its terms and conditions, should be previously approved and endorsed by the President and filed with the Secretary of the Interior. The eleventh section of the Act provided that, after this railroad shall be located to the valley of the Neosho River, any other railroad company, duly chartered, might connect, unite and consolidate with it upon equitable terms, and that, 'should the Leavenworth, Lawrence and Fort Gibson Railroad Company, or the Union Pacific Railroad Company, Southern Branch, construct and complete its road to that point on the southern boundary of the State of Kansas where the line of said Kansas and Neosho Valley Railroad shall cross the same, before the said Kansas and Neosho Valley Railroad Company shall have constructed and completed its said road to said point, then, and in that event the company so first reaching in completion the said point on the southern boundary of the State of Kansas shall be authorized, upon obtaining the written approval of the President of the United States, to construct and operate its line of railroad from said point to a point at or near Preston, in the State of Texas." This Act was approved July 25, 1866.

"On the next day the act was approved giving aid to the Union Pacific Railway Company, Southern Branch, which provided for aiding that Company 'to construct and operate a railroad from Fort Riley, Kansas, down the valley of the Neosho River, to the southern line of the State of Kansas, with a view to the extension of the same through a portion of the Indian Territory to Fort Smith, Arkansas.'

"Section eight of that Act declared that said Company was 'authorized and empowered to extend and construct its railroad from the southern boundary of Kan-

sas, south through the Indian Territory, with the consent of the Indians, and not otherwise, along the valley of Grand and Arkansas Rivers to Fort Smith, in the State of Arkansas,' and the right of way through said Indian Territory to the extent of one hundred feet on each side of the road purported to be granted by said section. Section eleven further provided, that after said road should be located to the valley of the Neosho and Grand Rivers, other duly chartered roads might consolidate with it in a similar manner to that provided in section eleven of the Act giving aid to the Kansas and Neosho Valley road.

"It was claimed on behalf of the Southern Branch, Union Pacific road, first that the act just referred to was complete in its terms, and did not recognize any community of interest in any part of its line with any other road; and, secondly, that the consent of the Indians required by said Act, was given in the Cherokee Treaty of 1866. In admitting, however, as was distinctly done, that the several acts and treaties were to be taken and construed together, I am of the opinion that the interpretation sought to be given by this company to its own charter, and to the treaties is practically abandoned. Its authorized route is down the valley of the Neosho and Grand Rivers. The Grand River is formed by the junction of the Neosho with a smaller stream called Spring River, and the Neosho crosses the southern line of the State of Kansas, and enters the Indian Territory before uniting with Spring River.

"In like manner the Kansas and Neosho Valley road has its route indicated, not only by its name, but in section eleven of its act, which has already been quoted. Its consolidation with other companies is permitted after it shall have located its line 'to the valley of the Neosho River.' The same section distinctly declares

that these roads shall have a common point at the southern line of the State of Kansas.

"It is hence demonstrated that both roads must be in the valley of the Neosho River, where it crosses the southern boundary of Kansas, in order to fulfill the terms of the acts under which alone they have the power to enter the Indian Territory, or obtain any right of way through the same. For that common point in the common boundary between Kansas and the Indian Territory, the three roads named were to run a race, and the one first reaching that point was to have the right of way southward through the Indian Territory, to Preston, in the State of Texas. Whatever latent ambiguity, therefore, there might be in the act authorizing the Southern Branch, Union Pacific Railroad, to enter the Indian Territory, seems to me to be thus perfectly explained when the terms of the two acts are carefully compared. This view of the case is decisively sustained by the debates in Congress on the passage of both acts.

"On the 13th of June, 1866., in the debate of the Senate on the Kansas and Neosho bill, Senator Hendricks, who appeared to champion the interests of the Leavenworth, Lawrence and Fort Gibson road, declared that the proposition was to start a railroad 'opposite to Kansas City, in Missouri, and to run down until it shall intersect the road to which we made a grant three years ago, and whichever road can get to the southern boundary of the State of Kansas first is to have the right to run through the Indian Territory. That is the proposition.' To this Senator Pomeroy, who, in like manner appeared to advocate the interests of the Kansas and Neosho road, responded that 'the proposition was a fair one.' Mr. Hendricks still objected that prior rights granted to the earlier incorporated road would be thus improperly interfered with.

"On the 20th of June, the debate was again renewed. Mr. Hendricks said:

> 'The eleventh section proposes to make a contest between three companies for the right of way through the Indian country and the right to build a railroad through the Indian country. This bill proposes that these three roads shall meet at the southern boundary of Kansas, and then it shall be a race of speed for the right to construct the trunk road from that point through the Indian country to the northern boundary of Texas.'

"This was again assented to, by all of the senators taking part in the debate, as being the true meaning and intent of the bill.

"On the 22nd of June, the same bill again under discussion, Mr. Henderson, chairman of the committee having the same in charge, said:

> 'In order that the Senate may understand what the proposition is, I will state that this section (the eleventh) provides, inasmuch as there are several roads running down to the southern borders of Kansas, that whichever road gets to the southern limits of Kansas first shall take the grant, and go on to the Gulf of Mexico. That is all that this section does. Instead of leaving it open for various competing lines hereafter to ask for several roads through the Indian country, it provides that whatever company completes its road down to the southern borders of Kansas first shall take the grant and build the road to the Gulf, and that there shall be but one road built in that direction.'

"Mr. Pomeroy said:

> 'In addition to what the Senator from Missouri has said, I desire to say this: The grant beyond

> the southern line of Kansas is simply the grant of the right of way with the consent of the Indians. It is not a grant of land, but a right of way with the consent of the Indian tribes, and all the tribes have made treaties consenting to it except one.'

"By referring to the date at which the several treaties referred to were executed, it will be seen that the treaty with the Choctaws and Chickasaws was concluded on the 26th of April, 1866; that with the Creeks was concluded on the 14th day of June, 1866; but that with the Cherokees was not concluded until the 19th day of July in the same year. It is therefore clear that the treaty with the Cherokees was that referred to by Mr. Pomeroy in the quotation above given and that it was the distinctly stated meaning of the act that these roads were to run through the lands of the Indian tribes whose treaties thus made a complete right of way for a trunk road from Kansas to Texas. If anything more were needed to prove that the common point of meeting at the northern boundary of the Indian Territory was fixed in the valley of the Neosho River where that river crosses the southeastern line, the evidence thus adduced would be conclusive. East of the Neosho River, and bounded upon it, in the northeast corner of the Indian Territory, are several small Indian reservations of the Quapaws, Senecas and others. To reach the Cherokee country, and in order to have a complete and perfected right of way, it was necessary that the railroads should enter the Indian Territory at its crossing by the Neosho River, or on the westward side of that stream. That the Act granting aid to the Southern Branch, Union Pacific Railroad Company, did not conflict with this interpretation is clear, not only from the comparison made of the language of the statutes themselves in the light of the debates already referred to, but when the last named

bill was itself before the Senate, on the third day of June, the debate shows that the opposition which had been, to a certain extent, made by Mr. Hendricks on the part of the Leavenworth, Lawrence and Fort Gibson Railroad Company, to the general scheme had been abandoned.

"In that debate he spoke as follows:

> 'I will state to the Senator from Michigan that I thought two weeks ago that we ought to confine the grant to Galveston Bay, or rather to the northern boundary of Texas, to the road to which we made the grant three years ago, but the Senate did not concur in that view, and this is part of the policy agreed upon two weeks ago by the Senate.
>
> 'MR. GRIMES: There is one question I should like the Senator from Indiana to answer.
>
> 'MR. HENDRICKS: I am not going to answer many questions.
>
> 'MR. GRIMES: I should like to know whether the Senator has investigated this subject sufficiently, so as to satisfy himself that if we pass this bill we will not mar the symmetry and beauty of that zebra-marked map which he exhibited to the Senate the other day, showing these additional railroad lines?
>
> 'MR. HENDRICKS: No, sir.
>
> 'MR. GRIMES: If so, I am satisfied with the bill.
>
> 'MR. HENDRICKS: I will state to the Senator that from a point about seventy miles south of the southern boundary of Kansas, it will start a new system of marks in a southeastern direction to Fort Smith, and with that addition, it will leave the maps as they are already marked.'

"By an examination of the map it appears that Fort Gibson, the original point of termination of the Leaven-

worth, Lawrence and Fort Gibson road, is at the mouth of the Grand River, where it flows into the Arkansas, and is, therefore, at the southern end of that portion of the trunk road which passes through the Cherokee country, the country south of the Arkansas River belonging to the Creeks. The direction from Fort Gibson to Preston, in Texas, is southwest. To reach Fort Smith, the road must descend the valley of the Arkansas River to the southeast. It also appears by the section lines on the map, that the distance, in a straight line from Kansas line to Fort Gibson, is very little over the distance named by the Senator. We also find that in the ordinary official maps published shortly after the passage of these acts on which the officers of this department have marked the projected routes as nearly as they could then be ascertained from the representatives of the companies themselves, that the Neosho Valley at the point where the river crosses the southern boundary of Kansas, is laid down, as the common point of junction for these roads, and Fort Gibson as the point at which the road to Preston diverges from the road to Fort Smith. Without reference, therefore, to the Indian treaties, I think it as clear as evidence can make it that the construction I have indicated as the scheme intended by Congress is that which is really contained in the laws. A glance at the treaties will only add strength to the conclusion of cumulative evidence.

"The general scheme which has been referred to, in providing for a trunk road running north and south through the Indian Territory from the Neosho Valley to Preston in Texas, implied necessarily that the road should traverse the country of the Cherokees, of the Creeks, of the Choctaws, and to some extent, at least, that of the Chickasaws. The road from east to west provided for a northern branch traversing the Cherokee

country, and that of the Creeks; its southern branch, running up the Canadian, would traverse the country of the Choctaws, the Creeks and the Seminoles, with a possibility of entering the Chickasaw country.

"It will thus be seen from a glance at the map that through the Seminole country a single east and west road was the only one entering into the general plan, while through the Creek and Chickasaw country, as well as the Cherokee, a road in each direction was contemplated. If, then, we turn to the treaty with the Seminoles, which was the first of the series, we find it declared in article five:

> 'The Seminole nation hereby grant a right of way through their lands to any Company which shall be duly authorized by Congress, and shall, with the express consent and approbation of the Secretary of the Interior, undertake to construct a railroad from any point on their eastern to their western or southern boundary, but said railroad company, together with all its agents and employes, shall be subject to the laws of the United States, relating to the intercourse with Indian Tribes, and also to such rules and regulations as may be prescribed by the Secretary of the Interior for that purpose.'

"If the words 'any company' in the above quotation stood alone, there might be doubt as to whether more than one company was intended; but when, in a subsequent clause of the same paragraph, the words 'said railroad company' in the singular number are used, it becomes entirely clear that but one company was meant, and that the word 'any' meant only one company and not several companies. In article six of the treaty with the Choctaws and Chickasaws similar language is used, authorizing the construction of 'a railroad through the

Choctaw and Chickasaw nation from the north to the south thereof, and from the east to the west side thereof;' and, subsequently, provides that 'such railroad company or companies, with all its or their agents and employes, shall be subject to the laws of the United States relating to intercourse with the Indian Tribes; and also to such rules and regulations as may be prescribed by the Secretary of the Interior for that purpose.'

"If it had been intended that this treaty should provide for any number of companies traversing the country that Congress might direct, there could have been no reason for using the cardinal points of the compass in describing the route of a road from north to south, and a road from east to west; but it would have been both more natural and more simple to have said merely that authority and right of way was granted to any railroad companies that might run through their territory under permission of acts of Congress, without specifying either number or direction. As the language stands, its most natural interpretation seems to me to be clearly in accord with what I have shown to be the general scheme provided by the Congressional acts.

"In the fifth article of the Creek Treaty while the language evidently has the same meaning as that which I have attributed to the Choctaw and Chickasaw treaty, it is more distinctly explicit. It declares:

> 'The Creek Nation hereby grant a right of way through their lands, to the Choctaw and Chickasaw country, to any company which shall be duly authorized by Congress, and shall, with the express consent and approbation of the Secretary of the Interior, undertake to construct a railroad from any point north of to any point in or south of the Creek

country, and likewise from any point on their eastern to their western or southern boundary; but said railroad company, together with all its agents, and employes, shall be subject to the laws of the United States relating to intercourse with Indian tribes, and also to such rules and regulations as may be prescribed by the Secretary of the Interior, etc."

"In this case the anxiety to avoid the appearance of consenting to more than one road in each direction has been evidently so great as to lead, if the words were taken alone, to a doubt in the other direction as to whether both roads were not intended to be under the control of a single corporation.

"When we come to the treaty with the Cherokees, which was the last of the series, and the one which has been mentioned in the quotation from the Senate debate which I have given, and was the one which completed the scheme of railroad communication through the Territory, its eleventh article, we find, provides for the similar grant of right of way, 'to any company or corporation which shall be duly authorized by Congress to construct a railroad from any point north to any point south, and from any point east to any point west, of and which may pass through the Cherokee nation.'

"The language here being almost identical with that used in the two preceding treaties, is so manifestly intended to indicate part of one system, that even without the light thrown upon it by the debate in Congress, and by the terms of the several statutes pertaining to the railroad companies, it would seem to me to be clear that the interpretation insisted upon by the Cherokee delegation is the true one ,and that it was the intention to provide for but a single road from north to south, and a single road from east to west through the Cherokee

country. We have, however, before us the further statement of Senator Harlan, who was the Secretary of the Interior at the time this treaty was made; of Messrs. William A. Phillips and J. W. Wright, whose names are appended to it as witnesses, that the interpretation I have given was in fact the one, and the only one, intended and declared at the time the treaty was made. Whether, therefore, we look to the language of the treaty and the statutes taken together, without the aid of extraneous testimony, or seek in the congressional debates, in the statements of those who were parties to the transaction, or witnesses thereto, to discover what was in reality intended between the United States and those Indians under its protection, we are brought to the same conclusion by a course of reasoning which seems to me entirely irrefragable.

"The only other point I deem it necessary to refer to in seeking the meaning of the statutes and the treaties, is in regard to the consent of the Indians, in accordance with which, and not otherwise, the Southern Branch Union Pacific road was authorized to extend its line to Fort Smith. I think that it is here equally clear, upon a comparison of the statutes, that it was intended that in so far as the line of this road should necessarily depart from the main trunk, running through the Neosho Valley to Preston, in Texas, it should do so only upon obtaining the consent of the Indian tribes through whose lands such diverging part of the road might go. As has been already remarked, it was distinctly declared in the Senate without contradiction, that such divergence would commence at a point somewhere about seventy miles south of the Kansas boundary line, and it is entirely clear that it was supposed that Fort Gibson was the point referred to. I accordingly find such to be the proper meaning and intent of the statutes in that regard.

"The only question which now remains to be determined is, whether either, and if so, which, of the railroad companies engaged in the race from points in Kansas for the northern boundary of the Indian Territory, has performed the conditions necessary to acquire the right to construct the trunk road north and south through the Indian Territory.

"I find that Mr. Joy, one of the principal stockholders and directors of the Kansas and Neosho Valley Railroad Company, in the year following the passage of the acts and the ratification of the treaties which have been mentioned, procured the possession, by purchase, of the tract of land in southeastern Kansas, immediately north of the boundary of the Indian Territory, known as 'the Cherokee neutral lands,' and that soon after this purchase the line of said railway company was located due north and south through the greater part of said Cherokee lands, and nearly, if not exactly, upon the line dividing the land so purchased into two equal eastern and western parts; that the construction of the road upon this line, which I believe to have been made for the purpose of giving, as nearly as possible, equally increased values to the lands so purchased, in all their parts, has taken this road off the line necessary to intersect the Indian boundary-line, at the Neosho River or near the same,' and that the road has, in fact, been constructed to a point on the Indian boundary line about ten or more miles east of said Neosho River, touching the reservation of the Quaqaws, through which no power to pass has been granted by treaty or by consent of the Indians holding that and several other small reservations in the northeastern corner of the Territory. I find, further, that the point where said Kansas and Neosho Railroad Company has touched the southern boundary of Kansas and the northern boundary of the

Indian Territory, is not one reasonably within the meaning and purpose of the general scheme which I have found to have been fixed by the legislation and treaties referred to. In addition to these considerations, I would submit that it would be manifestly unfair and inequitable if one company were allowed, at its own will, to change the plan of route so as to shorten its own line to the common point, and lengthen that of its competitors by a distance which might be twenty-five miles, or equal to that, from the Neosho River to the Missouri boundary line. I therefore find that the Kansas and Neosho Railroad Company is not authorized at present, under said legislation, to enter the Indian Territory and build the trunk line aforesaid, and that to complete its right at this time to do so, it would have been necessary for the said road to have been completely constructed to a point in the Neosho Valley at or near the crossing of the boundary line by the Neosho, and where it could enter the Cherokee country without crossing the reservation of any other Indian tribe. This the said Company has not done.

"As to the Southern Branch Union Pacific Railroad Company, I find that its line of road is in substantial accord with the scheme fixed by the legislation and treaties, but that said Company has not built a completed line of railroad up to this date to the crossing of the Indian boundary-line. I find further that the said Railroad Company, without completing its said road to the aforesaid common point of crossing the Indian boundary, has gone on in advance to grade within the Indian Territory, and is, therefore, an intruder within said Territory, and that the complaint of the Cherokee Nation in regard to them is well founded.

"As to the Leavenworth, Lawrence and Fort Gibson road, it is not averred on its behalf that it is now in a

condition to claim the right of entry to the Indian Territory.

"As to the Atlantic and Pacific Company approaching the Indian Territory upon the east, I do not find that its claim to cross the Cherokee country is disputed by any other corporation authorized to build a road in that direction; but not having had fully before me the facts requisite to determine whether said company has fulfilled all the conditions precedent to entering the Territory, and it being admitted that its road has not yet reached the neighborhood of the eastern boundary-line of the Territory, it is not necessary now to pass finally upon its rights.

"If you shall agree with me in the conclusions I have reached, it is apparent that, inasmuch as it may soon be necessary to decide which company shall first completely fulfill the conditions upon which its right to enter the Territory may depend, some means should be taken to have such determination made in a manner calculated to avoid disputes between any of the parties in interest and the Indians, and to avoid breaches of the peace which might arise out of such disputes.

"I would, therefore, respectfully recommend that the Superintendent for the Central Indian Superintendency, and the military officer acting as the superintendent for the Southern Indian Superintendency, be appointed by you, a commission, to determine which of the said railroad companies shall first fully comply with the conditions of the statutes as the same have been hereinbefore defined and to report to this department when such complete fulfillment shall have taken place; that an executive order be issued declaring that no railroad Company shall be permitted to enter said Indian Territory for the purpose of grading or constructing a railroad until such

report shall have been received and approved by yourself, and a formal permission given.

"There is incidentally connected with the discussion of these questions the further one as to the propriety of giving approval to the construction of other railroads through the Indian country than these which may be built in strict accordance with the scheme fixed by the treaties and by legislation.

"The policy of preserving the Indian Territory as free as possible from intrusion by white settlers, under any form, has been hitherto regarded as firmly established in this country. It has been based upon the well-known fact that the Indian tribes which are brought into closest contact with the whites have been uniformly injured by drunkenness, and other vices, which they have seemed peculiarly unable to resist, and the only hope of their complete civilization seems, by common consent, to rest upon our ability to keep them by themselves, under stringent laws with regard to the introduction of intoxicating liquors, and in circumstances where immoral intercourse with the whites shall be prevented as thoroughly as possible.

"The intelligent men among the civilized Indians fully appreciate the necessity of this policy, and their delegations have been extremely earnest in deprecating any course which may throw them into closer contact or more direct competition with our own people than is absolutely necessary. Negotiations for the removal of Indians from the small reservations in Kansas and Nebraska to the Indian Territory have been based upon this policy, and in order to carry it out with any degree of success it is necessary to adhere to it as firmly as possible.

"We cannot honestly advise the scattered and small tribes now within our organized States, to migrate to

the Indian country, except upon the honest assurance that there, with the advantages of teachers and mission establishments, and protected from the temptations which have heretofore been so ruinous to them, they may work out the problem of their possible civilization and final incorporation into the nation.

"I therefore, most earnestly advise, inasmuch as in the wisdom of Congress the scheme involving the building of but one trunk railroad through the Territory from north to south, with a branch from Fort Gibson to Fort Smith, and a double line from east to west, meeting in the valley of the Canadian, has been deemed sufficient for the necessities of our own commercial intercourse between different sections of the country, that this scheme be rigidly adhered to, and that no approval be given to any deviation therefrom.

"I am, sir, with great respect, your obedient servant,

"J. D. Cox, Secretary.

"The President.

Executive Mansion, May 23, 1870.

"The views and findings of the Secretary of the Interior herein are approved, and his recommendations will be carried into execution. U. S. Grant."

EXHIBIT 5

REPORT AND FINDINGS OF THE SECRETARY OF THE INTERIOR OF JULY 12, 1870, TO THE PRESIDENT, INCLUDING THE REPORT OF A COMMISSION DATED JUNE 13, 1870, WHICH HAD BEEN APPOINTED TO DETERMINE WHICH RAILROAD COMPANY FIRST REACHED THE NORTHERN BOUNDARY OF THE INDIAN TERRITORY AND BECAME ENTITLED TO BUILD THROUGH THE INDIAN TERRITORY AND ACQUIRE THE RIGHT-OF-WAY AND LANDS GRANTED BY THE ACTS OF CONGRESS, AND THE APPROVAL OF THE PRESIDENT OF THE UNITED STATES OF SUCH FINDINGS.

"DEPARTMENT OF THE INTERIOR,

WASHINGTON, D. C., July 12, 1870.

"*To the President*:

"SIR:—On the 21st of May, last, I laid before you a communication with regard to railroads in the Indian Territory, in which I reported that I found under the legislation of 1866 and the treaties with the Cherokee, Creek, Choctaw and Chickasaw and Seminole Indians of the same year that three railroads in the State of Kansas were authorized to build their lines to a common point on the northern boundary of the Cherokee lands in the Indian Territory, near where the Neosho River crosses said boundary, and that the road which should succeed in first reaching said common point should be authorized to build a trunk road through the Indian Territory to a point at or near Preston, in the State of Texas, and that but one such trunk, from north to south, was authorized to be built. I recommended

that, if you should agree with me in the conclusion I reached, the Superintendent for the Central and Southern Indian Superintendencies be appointed a Commission to determine which of the said railroad companies should first fully comply with the conditions of the statutes as the same were defined, and to report to this Department when such complete fulfillment should have taken place. The views and findings which I laid before you were approved by you on the 23d of May, and you directed that my recommendations, including those above referred to, should be carried into execution. I have now the honor to state that I have received a report from said Commissioners, dated the 13th day of June, 1870, showing:

"1st. That the Union Pacific Railway, Southern Branch, reached the northern boundary of the Indian Territory, in the valley of the Neosho River, on the west side and about one mile therefrom, at 12 M. on the 6th day of June, 1870, and that at that time there was no other railroad nearer than sixteen miles of that point.

"2nd. That on the 9th day of June, 1870, Governor James M. Harvey, of the State of Kansas, the officer specified by Act of Congress to pronounce upon the completion of this railroad, certified over his official seal and signature that the same was a first-class completed railroad to the northern boundary of the Indian Territory.

"Under a misapprehension as to the condition of the controversy between the several roads before yourself and this Department, the said Commissioners proceeded further to make some statements with regard to the Kansas and Neosho Valley Railroad, which reached the northern boundary of the Indian Territory on the 30th day of April, 1870, but at a point about fifteen miles east of the Neosho River, and upon the borders of

the Quapaw reservation, through which no right for any railroad company to enter has been granted by the Indians, as I have formerly reported to you in my communication of the 21st of May, above mentioned.

"I transmit herewith a complete copy of said Commissioners' report, for your information, and state that, while their views expressed upon the matters not submitted to them, and the documents forwarded by them, have had full weight, so far as they properly might, in the consideration of questions arising before me, I have regarded their official determination as embodied in the two paragraphs which I have quoted above, ending at that portion of their letter commencing with the statement that 'by a strict adherence to our various instructions this report would here close.'

"I have also on file with said papers the original letter of Governor Harvey, of Kansas, referred to by the Commissioners, addressed to myself, dated June 9th, 1870, in which he declares that, 'on the 6th instant, said road was completed to the south boundary of the State, and on the 7th and 8th instants, I (he) passed over the same, and made a careful and critical examination of its construction and equipment, and hereby certify that said Missouri, Kansas and Texas Railway Company have constructed a first-class railroad, beginning at its junction with the Kansas Pacific Railway at Junction City, from thence in a southeasterly course, to the headwaters of the Neosho River, and thence down the valley of the said River to the State line of the Cherokee Nation, south of the town of Chetopa.'

"Upon the receipt of these documents, I caused the several parties in interest to be notified that at such time as might be convenient to them, I would sit to hear causes shown, if any there were, why said report should

not be received as conclusive of the fact that the Union Pacific Railroad Company, Southern Branch, now called the Missouri, Kansas and Texas Railway Company, had first complied with the conditions prescribed for securing the right to construct the trunk road through the Indian Territory.

"On the 9th instant, the said parties appeared before me, and arguments were heard thereon, which have been this day concluded. The point made by the Kansas and Neosho Valley Railroad Company is, that no satisfactory evidence is before the Department that the character of said Southern Branch Pacific Railway is that of a good completed road.

"No testimony was submitted as to the character of the road, but several informal statements, not sworn to, were read, or orally made, and a similar class of statements, by way of rebuttal, was made upon the other side.

"A paper forwarded with the report of the commissioners, was also referred to, as showing that the Southern Branch Road was not equal in the character of its construction to the Kansas and Neosho Valley Road. The circumstances under which the examination of the Commissioners was made, were such as to satisfy me that said paper was not based upon any actual measurements or specific investigations of the Commissioners themselves, but was probably received with an argument and other papers, irregularly submitted to them by Mr. Joy.

"I have therefore confined my considerations, for the present, to the question whether, under the several statutes authorizing the construction of those roads, the certificate of the Governor of Kansas is the conclusive evidence of the character and completion of the road, required by law. It was admitted in the argument be-

fore me that such certificate was conclusive and final for the purpose of entitling the Company to its land grants, but not for the purpose of determining its compliance with the 11th section of the Act of July 25, 1866, and determining its right to build the trunk road.

"If such certificate be the conclusive evidence required by law, inquiry as to facts, *ab extra*, must be unnecessary. If it is not conclusive, but the Department or yourself must determine the fact of the sufficiency of the road upon other testimony, then I should not be satisfied with anything less than a complete examination by a scientific commission or a full investigation, upon the sworn evidence of experts, who had made a scientific examination. On the question, what the law requires, as the evidence of the completion of these roads, I find that, substantially, the same provision is contained in both statutes authorizing the construction, respectively, of the Kansas and Neosho Valley Railroad, and the Southern Branch Pacific Railroad.

"The former of these statutes declares that:

'When the Governor of the State of Kansas shall certify that any section of ten consecutive miles of said road is completed, in a good, substantial and workmanlike manner, as a first-class railroad, then the said Secretary of the Interior shall issue to the said Company, patents for so many sections of the land, within the limits above named, as are co-terminous with said completed section, hereinbefore granted; and when certificates of the Governor aforesaid shall be presented to said Secretary, of the completion as aforesaid, of each successive section of ten consecutive miles of said road, the said Secretary shall, in like manner, issue to said Company patents for the land for each of said sections of road, as in the first instance, until said road shall be

completed; Provided, That if said road is not completed within ten years from the date of acceptance of the grant hereinbefore made, the lands remaining unpatented shall revert to the United States. Section 3, Act of July 25, 1866.'

"The second of said Acts provides for precisely the same mode of determining the completion of the several sections of the road in language not only of the same import, but almost identical in terms, and I find in neither of said acts any other mode of determining the completion or quality of either road down to the southern boundary of Kansas. No boards or commissioners are provided, such as were used in regard to the railways to the Pacific Ocean, and no indication is given of any other evidence of the completion of the road being required, except such certificate of the Governor of Kansas.

"In section 11 of the Act of July 25, 1866, which prescribes the manner in which the race for the northern boundary of the Indian Territory shall be made, no new criterion as to construction is introduced. It simply provides that the company 'first reaching in completion, the said point on the southern boundary of the State of Kansas shall be authorized, upon obtaining the written approval of the President of the United States, to construct and operate its line of railroad from said point to a point at or near Preston, in the State of Texas,' etc.

"I am forced, therefore, to the conclusion that the completion referred to must be understood to be a completion, in accordance with the terms of the act authorizing the construction of each road, and that when the road is so completed, it would be accepted, and its patents issued under the terms of such statute. We have no further inquiry to make with regard to it.

"I am, therefore, of opinion that such completion and the quality of the road is not a question of fact to be determined upon any other evidence than that which the Statute prescribes, and that the certificate of the Governor of Kansas, that the Southern Branch Pacific Road has reached the northern boundary of the Indian Territory as a completed first-class railroad, is conclusive evidence of that fact; and, further, that the certificate of Commissioners Hazen and Hoag, that no other road was within fifteen miles of the common point at which said roads were to enter the Indian Territory, is unquestioned by either party, and is, therefore, satisfactory evidence that said Southern Branch Pacific Railroad has first complied with the terms of your order of the 23d of May.

"If you shall agree with me in this conclusion, I recommend that you give the said Union Pacific Railroad Company, Southern Branch, in accordance with the terms of the eleventh section of the Statute of the 25th of July, aforesaid, your written approval to construct and operate its line of railroad from said point on the northern boundary of the Indian Territory to a point at or near Preston in the State of Texas, subject to such conditions as to the mode of construction and completion as may make it fit and sufficient as a trunk road, for the commerce of all the branches, north and south, which may be expected to move over it.

"Down to the southern boundary of Kansas, which was the original terminus for these several roads, under the acts organizing them, no approval was required but that given by the Act of Congress, and no certificate of completion, but that of the Governor of Kansas. Inasmuch, however, as your approval is requisite, by the same statute, to the construction of the trunk, by any company, through the Indian Territory, you are, in my judgment, authorized (and I am well convinced that the

public interests require that it should be done) to prescribe such reasonable mode of construction and completion as shall fit such trunk road for all the purposes for which it was intended. The several branches have no interest in the good character and quality of the other branches down to the point of junction, but each has a great interest in having the trunk road so satisfactory and complete a one, that its own business shall not be impeded or its passengers endangered. To secure this end, I would recommend that you prescribe that said trunk road shall be made upon the easiest grades and curves which are practicable; its road-bed raised above the reach of floods, and thoroughly drained; its bridges and culverts of solid, durable and approved construction; its ties not less than 2,700 to the mile and of hard wood; its rails not less than 56 pounds weight to the yard, thoroughly coupled by the fish joint; and the road throughout its complete length, before it shall be finally accepted, well ballasted with stone, or gravel, and fully furnished with side-track, water and fuel stations and rolling stock, up to the standard required of the railways to the Pacific Ocean. For the purpose of securing such construction, I would recommend that a commission of three competent persons be appointed, whose certificate shall be required in similar manner, and who shall be paid by said Company, at the same rate as was done in the case of the Union Pacific Railroad to the Pacific Ocean.

"I would further recommend that besides the agreement of such Company to comply with these terms, they shall further be required, before entering said Indian Territory, to give bond in a reasonable amount, payable to the United States, or to either of the Indian Nations, through whose territory they may pass, conditioned that they shall in every particular respect the rights of said Indan tribes, and the individuals there-

of, as guaranteed by the treaties, and the intercourse and other statutes of the United States; that they shall commit no waste upon said Indian lands, nor take materials therefrom, except under contract with said Indian tribes, or individuals thereof, who may make sales of individual property; such contracts, whether with the nations or individuals, to be valid only when approved by the proper officers of the Indian Department.

"The counsel for the Cherokee Nation, in a written argument filed with me, have urged that no sufficient legislation yet exists to authorize either of the companies who might win the race to the southern boundary of Kansas, to enter the Cherokee Territory, and that further legislation is necessary to protect the rights of the Indians, and define the manner in which the privilege of entering and building a road should be exercised. After careful examination of this argument, and with the fullest desire to do whatever may be necessary to protect the rights of the Indians in the premises, I am of opinion that the statutory right to enter the Territory is complete upon the fulfillment of the conditions precedent, which have been fixed, and that the necessity for your approval of the acts of the Railroad Company and their mode of construction, together with your undoubted power to suspend their operations in building, whenever they shall cease to conform to the intercourse, laws and other statutes, and to the regulations which you may prescribe, are sufficient to secure proper respect to and observance of all the rights of the Indians in the premises.

"I am, sir, with great respect,

Your obedient servant,

J. D. Cox, Secretary.

"Approved, and the recommendations of the Secretary of the Interior will be carried into execution.

July 20, 1870. U. S. Grant."

EXHIBIT 6

NOTIFICATION BY THE SECRETARY OF THE INTERIOR TO THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF JULY 22, 1870, THAT SAID COMPANY HAD, BY COMPLYING WITH THE CONDITIONS PRECEDENT ACQUIRED THE RIGHT TO CONSTRUCT ITS RAILROAD THROUGH THE INDIAN TERRITORY, PRESCRIBING CERTAIN SPECIFICATIONS FOR ITS CONSTRUCTION AND REQUIRING SAID RAILWAY COMPANY TO GIVE A BOND IN A REASONABLE SUM PAYABLE TO THE UNITED STATES OR TO EITHER OF THE INDIAN NATIONS, AND AUTHORIZING THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, UPON FILING A MAP OF ITS ROAD AND GIVING THE BOND TO CONSTRUCT ITS RAILROAD THROUGH THE INDIAN TERRITORY.

"WASHINGTON, D. C., July 22, 1870.

"DEPARTMENT OF THE INTERIOR.

"SIR:

"The President has approved the finding of the Secretary of the Interior that the Missouri, Kansas and Texas Railway Company had, by complying with the conditions precedent, become entitled to construct their railroad through the Indian Territory, and has prescribed, that to secure the proper construction thereof, south of the southern boundary of the State of Kansas, the road 'shall be made upon the easiest grades and curves which are practicable; its road-bed raised above the reach of floods and thoroughly drained; its bridges and culverts of solid, durable, and approved construction; its ties not less than 2,700 to the mile, and of hard wood; its rails not less than 56 pounds weight to the yard, thoroughly coupled by the fish joint; and the road

throughout its complete length, before it shall be finally accepted, well ballasted with stone or gravel, and fully furnished with side-tracks, water and fuel stations, and rolling stock, up to the standard required of the railways to the Pacific Ocean, for the purpose of securing of such construction.....a commission of three competent persons (will) be appointed, whose certificate shall be required in similar manner, and who shall be paid by said Company, at the same rate as was done in the case of the Union Pacific Railroad to the Pacific Ocean.

"Besides the agreement of such Company to comply with these terms, they shall further be required, before entering said Indian Territory, to give bond in a reasonable amount, payable to the United States, or to either of the Indian Nations, through whose territory they may pass, conditioned that they shall in every particular respect the rights of said Indian tribes, and the individuals thereof, as guaranteed by the treaties, and the intercourse and other statutes of the United States; that they shall commit no waste upon said Indian lands, nor take materials therefrom, except under contract with said Indian tribes, or individuals thereof, who may make sales of individual property; such contracts, whether with the nations or individuals, to be valid only when approved by the proper officers of the Indian Department.

"The Missouri, Kansas and Texas Railway Company will, therefore, on filing a map of their route, and the required bond, in this Department, be authorized to construct their road through the Indian Territory, to Preston and to Fort Smith, subject, however, to a compliance with the terms and conditions hereinbefore men-

tioned, and to such orders as may be made by this Department for the purpose of enforcing such terms and conditions.

"Very respectfully, your obedient servant,

"J. D. Cox, Secretary.

"Levi Parsons, Esq.,
Pres. M., K. & T. R. W. Co.,
No. 7 Nassau St., New York."

EXHIBIT 7

REPORT OF A COMMISSION APPOINTED BY THE SECRETARY OF THE INTERIOR TO EXAMINE THE LINE OF RAILWAY OF THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY FROM THE SOUTHERN BOUNDARY LINE OF KANSAS TO THE ARKANSAS RIVER, AND THE RECOMMENDATION OF THE SECRETARY OF THE INTERIOR THAT SAID PART OF SAID RAILWAY AND TELEGRAPH LINE BE ACCEPTED, AND THE ACCEPTANCE THEREOF BY THE PRESIDENT.

"SEDALIA, MO., Dec. 21st, 1871.

Department of the	
Jan. 5, 1872.	
Interior.	

"SIR:

"The undersigned Commissioners appointed by the President of the United States to examine and report upon the Railroad of the Missouri, Kansas and Texas Railway Company, from the south line of Kansas to the Arkansas River, in the Indian Territory, have the honor to report the following as the result of their examination:

"In pursuance of said appointment they met at Sedalia, Missouri, the headquarters of said Missouri, Kan-

sas and Texas Railway Company, on Tuesday, the 19th day of December, 1871.

"Before proceeding to examination of the road, your Commissioners required the President of the Company to file with us his affidavit, stating therein the commencement, length and termination of the Road, and that it is completed as required by law and the instructions of your office, which affidavit and the profile of the Road, and also a map of the same properly certified by the President and Chief Engineer of the Company are herewith transmitted.

"In pursuance of instructions your commissioners proceeded to the commencement of said Company's line of Railroad at the south line of Kansas, arriving thereat on the morning of Wednesday, the 20th day of December, inst., and passed thence over the entire line of said Railroad to the Arkansas River, making a personal inspection, stopping at all stations, bridges, etc., examining the roadway, grading, masonry, bridges, culverts, tracks and ties, which we found constructed in a good, substantial, and workmanlike manner as a first-class railroad.

"The manner of construction of said railroad is more fully set forth in the report of O. B. Gunn, Chief Engineer of said Railway Company, made to us at our request, which report from our observation we believe to be substantially correct, and the same is herewith transmitted and made a part of our report. The material used in the construction of said Railroad seems to be the best which the country affords. The ties on the entire line are without exception of hard wood, fully up to the regulation standard in size and number; the rails are of first quality of English iron, weighing 56 lbs. per

lineal yard, the joints "fish plated" and rails fully spiked; the culverts and bridges are of the most substantial character and thorough construction, as more fully set forth in said Engineer's report; the side-tracks are ample and conveniently located, and in length exceeding the percentage required.

"The water and depot stations, rolling stock and equipment are ample and of improved construction, and fully adequate for any amount of business that the country is likely to afford.

"The width of embankments and excavations is up to the standard required by your instructions, and the drainage is complete.

"The track is ballasted in the main with top soil; in a few places, however, sand and broken rock has been used, and we are assured by the officers of the company that a better material will be used throughout the entire line as fast as circumstances will admit. The alignment and grades are as represented in the Engineer's report above referred to.

"We deem it proper to state, although specifically not requested to do so, that a single wire telegraph line is built and in operation along the entire line of said Road, constructed of white cedar poles, and such wire as is in common use for telegraph purposes.

"In conclusion, therefore, we respectfully recommend the acceptance of the said Railroad by your Department.

"The additional instructions contained in your communications of Dec. 12, 1871, in regard to the connection of said Railroad with the Atlantic and Pacific Rail-

road at Vinita, will be the subject of a supplemental report to be transmitted in a few days.

"We have the honor to be, etc.,

C. W. BABCOCK,
WM. VANDEVER,
M. HILTON,
Commissioners.

"TO THE HON. C. DELANO,
Secretary of the Interior,
Washington, D. C.

"Sworn to and subscribed before me this 21st day of December, A. D. 1871. Witness my hand and notarial seal.
L. B. JACKSON,
(SEAL) Notary Public.

'CHIEF ENGINEER'S OFFICE.
M., K. & T. RY.

SEDALIA, MO., Dec. 19, 1871.

To the Board of Government Commissioners Appointed to Inspect the Missouri, Kansas and Texas Railway.

'GENTLEMEN:—The section of railroad which you are ordered to inspect, extending from the Southern Boundary of the State of Kansas to the Arkansas River, is 86.76 miles in length, and built in all respects fully up to the standard of first-class Western railroads.

'The alignment of this section is most excellent, being made up generally of long tangents and light curves, 92 per cent of the whole being straight line, and but 8 per cent of curved line, and the curve portion being very light with radii from 5,730 to 11,460 ft.

	Miles.
'Total length tangent equals	79.78
Total length 30' curve radius, 11,460 ft	3.94
Total length 40' curve radius, 8,594 ft	0.23
Total length 1° curve radius, 5,730 ft	2.81
'Total	86.76

	Miles.
'Longest tangent is	14.82
Shortest tangent is	0.12
Longest curve	11.56
Shortest curve	0.04

'GRADIENTS.

'The grades upon a considerable portion of this section are level, while the maximum grade is 52.8 ft. per mile, equal to one foot rise per one hundred feet. Care has been taken to raise all grades across streams and other low places high enough to be above the highest floods known to the country. The grades are as follows:

	Miles.
Level	22.00
Level to 10 ft. per mile	7.14
10 ft. to 20 ft	10.70
20 ft. to 30 ft	16.89
30 ft. to 40 ft	15.34
40 ft. to 52.8 ft	14.69
Total	86.76

	Miles.
The longest level grade is	1.47
The longest maximum grade is	1.06

Per cent of level line, 25½ per cent.
Per cent of maximum grade, 8 per cent.

'MASONRY.

'All masonry on the line is the best of its class. All of the box culverts are built of the usual class of rubble masonry laid dry.

'All bridge abutments are of bridge masonry, well cut, jointed, and bedded and generally laid in a good bed of quick lime mortar, and is the best of its class. The masonry in the bridge across the Verdigris River is of the very best quality built upon ralroads, all closely hammer dressed, and laid up in the very best of hydraulic cement thoroughly girted. No expense has been spared to make it a first-class bridge in every respect.

'The shore abutments are founded on a hard compact clay. The North Pier was sunk in a timber caisson in 16 ft. water and founded upon the rock.

'The South Pier is founded on 63 piles, driven to rock and the heads cut off square and filled around with concrete.

'Rock for this bridge was hauled 2 43/100 miles while rock for some culverts and abutments has been hauled a distance of 7 miles.

'BRIDGES.

'All bridges, exceeding 20 ft. and less than 60 ft. clear spans are of a class known as trussed girder bridges, having their support or trusses of iron placed underneath the track.

'Two spans of 60 ft. each in clear over Wolf and Fisher Creeks and one of 154 ft. over Pryor Creek, are of the well-known Howe Truss Pattern. All of the other spans are of the Post patent Diagonal Truss Pattern, having the bottom chord, and all other parts having tension strains of best wrought iron, while the parts

having compression strains only, are of timber, and this timber in all cases of truss bridges, is thoroughly "Burnettized," passing through a chemical process which it is believed will add fully 100 per cent to the lasting quality of the timber.

'In addition to this precaution we intend, the coming season, to house in the top chord and keep the posts and iron work thoroughly painted, so that we confidently believe that no timber work in the bridges will need to be replaced except the floors, for at least 20 years.

'The spans of truss bridges over 40 ft. are as follows in their order:

Russell Creek	100 ft. clear span
Little Cabin Creek	100 ft. clear span
Big Cabin Creek	150 ft. clear span
White Oak Creek	100 ft. clear span
Rock Creek	122 ft. clear span
Wolf Creek	60 ft. clear span
Pryors Creek	150 ft. clear span
Chouteau Creek	80 ft. clear span
Flat Rock Creek	80 ft. clear span
Fisher Creek	60 ft. clear span
Verdigris River	500 ft. total

'Two spans of 150 ft. each and middle span of 200 ft. Of stringer bridges, ranging from 10 to 20 ft., opening, there are 51.

'Of trussed girders 30 ft. opening there are 13. Of trussed girds of 40 ft. opening, there are 4.

'There is also on Pryors Creek bottom, 100 ft. of pile bridging across a slough, where it was deemed better adapted than any other structure. There is also a trestle bridge 90 feet long in the Arkansas bottom across a pond now drained where rock could not be hauled, and the nearest obtainable rock was 9 miles distant.

'TRACK.

'The track is laid on best English iron, weighing 56 lbs. per lineal yard, with "fish plate joints" full spiked throughout and with four spikes to each tie, and is all in good line and surface. The track is ballasted generally in the way common to Western roads of filling and surfacing with the black top mould, which answers a good purpose, and some short sections have been ballasted with broken rock.

'About four miles between the Arkansas and the Verdigris Rivers have been ballasted with sand from the bank of the Arkansas River, which makes an excellent ballast.

'It is intended eventually to ballast the whole road with sand, gravel or broken rock.

'TIES.

'The ties are generally of white burr and pin oak, and red elm, with a few black oak, locust and mulberry.

'They are 8 feet long, leaved on opposite sides, 6 inches thick, and generally from 6 to 8 inches face, and are believed to be fully up to the standard required, and much better than those used on most new Western roads.

'On a large proportion of the line, timber for ties could only be had from remote points, involving a haul of from five to eight miles, while the most northerly portion had to be supplied from points on the Missouri Pacific R. R. and hauled by cars nearly 200 miles. The ties are laid at the rate of 2,640 to the mile.

'SIDE TRACKS.

'There are eight side tracks on the section, exclusive of two or three that are of a temporary character. They are as follows

Blue Jacket	1,200 ft.
Vinita	1,600 ft.
Big Cabin	1,350 ft.
Fourth Siding	1,000 ft.
Pryors Creek	1,750 ft.
Chouteau	1,778 ft.
Flat Rock	2,004 ft.
Gibson	1,980 ft.

Total 13,554 ft.—2 58/100 miles, or about three per cent of the whole section.

'Depots and Water Stations.

'There are three (3) depots upon the Section, to-wit, at

Big Cabin Station,
Chouteau Station, and
Gibson Station.

'Also four water stations, at:

Russell Creek,
Big Cabin,
Flat Rock and
Verdigris River.

'Rolling Stock.

'As this Company is operating nearly 500 miles of road, less than one-fifth of it being in the Indian Territory, an enumeration of the particular engines, cars, etc., belonging to this section of road is impossible. In the construction account, $226,000 have already been charged up to this section, as the proper proportion of its equipment, being about $2,600 per mile.

'A telegraph line has also been completed the whole length of this section, built in the best manner, the poles all being of white cedar from the State of Michigan.

'Telegraph offices are established at Big Cabin, Chouteau and Gibson Stations, the last being the station for the Government post of Fort Gibson, located six miles distant.

'I deem it proper to state in reference to the continuation of this road south of the Arkansas River, that it is all under contract to Red River, the southern boundary of the Indian Territory. Upwards of forty additional miles are already graded and ready for the track, and a large force of workmen engaged in the work of construction at and below the Canadian River, and track laying will proceed rapidly as soon as the great bridge across the Arkansas River, a very fine structure of 840 feet in length, is completed, which will be done during the present week.

'Accompanying this report is a map showing the alignment, topography near the line, crossing streams, location of side tracks, tanks and depots. Also a profile showing the grades, cuts, fills, locations and character of bridges and culverts. Both map and profile have been made as complete as possible.

'I have the honor to be, very respectfully,

Your Obedient Servant,

O. B. GUNN,
Chief Engineer, M., K. & T. Ry.'

"DEPARTMENT OF THE INTERIOR.

WASHINGTON, D. C., 12th May, 1872.

"SIR:—I have the honor to transmit herewith, for your action the report, dated 21st December, 1871, — of Messrs. Babcock, Vandever and Hilton, Commissioners appointed by you on the 28th Nov. last to examine and report upon the Missouri, Kansas & Texas Railway from

the south line of Kansas to the Arkansas River, in the Indian Territory, a distance of 86 76-100 miles. The Commissioners report that the road is constructed in a good, substantial and workmanlike manner, as required by law and the instructions of the Department, and that there is a telegraph line completed the entire length of the road. I, therefore, respectfully recommend the acceptance of said road and telegraph.

"Very respectfully, Your obedient servant,

"B. R. COWAN,
"Acting Secretary.

"TO THE PRESIDENT.

(Endorsed)—"Department of the Interior, 17 May, 1872.

"Mo., K. & T.—Hon. H. B. Cowen, Acting Secretary, recommends acceptance of road and telegraph line of the Mo., Kansas & Texas R. W. Co. from the Southern line of Kansas to the Arkansas River, a distance of 86 76-100 miles.—S.

"Executive Mansion, May 17, 1872.—The within recommendations of Acting Secretary of the Interior are approved, and the Department will carry them into effect.—U. S. Grant.

"Notified Prest. of Co. Comr. G. L. O. L. Com'r. Indian Affairs of acceptance, 18 May, '72."

EXHIBIT 8

REPORT OF A COMMISSION APPOINTED BY THE SECRETARY OF THE INTERIOR TO EXAMINE THE LINE OF RAILWAY OF THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY FROM THE ARKANSAS RIVER TO THE RED RIVER NEAR PRESTON, TEXAS, AND THE RECOMMENDATION OF THE SECRETARY OF THE INTERIOR THAT SAID PART OF SAID RAILWAY AND TELEGRAPH LINE BE ACCEPTED, AND THE ACCEPTANCE THEREOF BY THE PRESIDENT.

Department of the

Feb. 26, 1873.

Interior.

"ST. LOUIS, MO., January 13, 1873.

"SIR:

"The undersigned, Commissioners appointed by the President under order from your Department of the date of 10th December, 1872, to examine that portion of the completed line of the Missouri, Kansas and Texas Railway, commencing at the end of the 86.76 mile (south of the southern boundary of Kansas) and ending at Red River, near Preston, Texas, have the honor to report:

"That they met at Sedalia, Mo., on the morning of the 8th of January, 1873, and entered upon the discharge of the duties assigned them by the Commission.

Proceeding to the initial point indicated in their instructions—which is the crossing of the Arkansas River, 86.76 miles south of the Kansas line, the Commissioners commenced their examinations, moving southward and carefully inspecting road-bed, superstructure, bridges, buildings, etc., over the entire distance to Red River, having with them O. B. Gunn, Chief Engineer of the Company, to explain all matters not obvious to the sight of the Commissioners. Having spent sufficient time in the examination to satisfy themselves fully as to the facts, your Commissioners are prepared to submit the following report:

"*Location*:

"They find that the entire line from Arkansas to Red River is well located, showing care and skill in the selection of the route, and in turning the natural obstacles that were met in the way.

"*Grades and Curves*:

"The grades of the road are excellent, nearly one-third is level, more than half the distance under thirty feet to the mile, and where the nature of the ground compels a steeper grade, it has in all cases, although in some instances at very considerable cost, been kept under fifty-three feet to the mile.

"The curves are all easy, and a very large per cent. of the line is tangent, the entire length of the road, in fact, exceeding but slightly the air line between the initial and terminal point. These favorable facts will insure not only great speed, but an unusual degree of safety in the running of trains over this very important road.

"*Embankments*:

"The embankments have obviously been built according to the requirements of the government, and although those freshly thrown up had in some localities

been seriously washed by heavy rains just preceding the visit of the Commissioners, the Company exhibited a proper vigilance in the premises by the presence of working parties engaged in their repair.

"*Excavations*:

"The excavations, both of earth and rock, were found in all cases to accord with the requirements of the government.

"*Mechanical Structures*:

"The culverts and abutments for bridges and drains, for about one hundred and twenty miles south of the initial point of this examination, are of stone. The more important masonry exhibited in the abutments and piers of the bridges over the Arkansas, the Canadian and Red River, and other considerable water courses, is of an exceptionally massive and admirable character. It would be creditable on any road in the country. On the lower portion of the road, stone suitable for masonry was not in all cases accessible, and pile and trestle work has in part been resorted to. But this class of work has been well done and insures a safe roadway, and durable for some years to come. It would be economy and add nothing to the security or usefulness of the road to remove this class of work when well put in, until it has performed the service it is capable of. In regard to all the bridges of the road examined, the Commissioners report them compact and of a strength many times exceeding any probable strain upon them.

"The timbers are well selected, of the best wood, and burnetized, and every device will, we are assured, be resorted to to render them durable.

"*Sidings*:

"The side tracks of the road exceed the per cent indicated as sufficient by the Department.

"*Ballasting*:

"There is no suitable material found for ballasting on the line of the road, and if stone be used, it will require to be crushed for the purpose. Arrangements for doing this by suitable machinery are, we are informed, being made by the Company. In the absence of stone or gravel for immediate use, the Company have ballasted a large portion of the road, and are ballasting the remainder, with the material of which their roadbed is formed. The portion of the road that has been built and ballasted in this way long enough for the embankments to have become well settled is remarkably smooth; and, except in seasons of excessive frost and rain, not often experienced in the region where the road runs, will meet every requirement of a first-class railroad. The entire roadbed is well lifted up and sloped and the sides carefully ditched, securing a drainage that gives both elasticity and solidity to the roadway, and leaves little to be asked for in the way of ballasting. Unless it is the interest of the Company to substitute a ballasting of crushed stone at an expense not warranted by any inferior service of the road as it is, the government will promote no public interest by insisting on it—at least not faster than the Company will be willing to do it. It should be done at a moderate and economical rate of progress.

"*Cross Ties*:

"It is a source of satisfaction to the Commissioners to say that a better lot of ties, or of hard wood, they have never seen on any road than are found on the entire

length of the M., K. & T. Road, and their number to the mile fully meets the requirements of the Department.

"*Rails*:

"The rails laid are of English manufacture, weighing fifty-six pounds to the yard; the rails coupled invariably by fish joint and spiked to every tie.

"*Rolling Stock*:

"The rolling stock is sufficient for the present use of the road, but will not long continue so. The early connection of the track of the M., K. & T. Railroad with that of the Texas Central will unquestionably open up an enormous traffic over the line of the M., K. & T. Road, exceeding that of most roads in the West. The interest of the Company will compel them to increase the equipage of the road as its business demands.

"*Buildings*:

"The engine houses, repair shops, warehouses and station buildings are sufficient for the present use of the road, and their style of structure is such as the Department has prescribed. Water stations are provided at convenient distances, and fuel depots, where excellent coal from the mines on the line of the road, of limitless quantity, is stored for the use of the trains.

"The Commissioners have thus presented in brief, and general, but they trust, sufficiently full and explicit terms, the result of their examination of the line of the M., K. & T. Road, under your instructions of 10th December, 1872. They refer to the accompanying maps and statements of O. B. Gunn, Chief Engineer, for more detailed and technical information. The Commissioners close with the general remark, that in their judgment the Missouri, Kansas and Texas Railway Company have performed their work in perfect good faith,

have complied, as far as practicable, with all requirements of the government, have built a first-class railroad, which they are impelled by the immense value of the property and the very great revenue it will soon be capable of producing, to maintain in good condition and steadily increase in effectiveness: All doubt may be considered fairly removed as to the interest of the government being fully protected, and the Commissioners recommend that the road be accepted. It is no part of the Commissioners' duty to go outside of their instructions to express opinions as to any personal merit exhibited in the location and construction of the Missouri, Kansas and Texas Railway, but when it is considered that the line of the road crosses all the streams of drainage for the territory through which it is built, they are constrained to record the opinion that the low grades and slight curvature obtained, as well as the general thoroughness of construction, evince a remarkable success of engineering skill and confer signal credit upon the Engineering Department of the Company.

"All of which is respectfully submitted,

WM. VANDEVER,
A. S. MITCHELL,
WALTER L. MAYO.

'HON. C. DELANO,

'State of New Jersey, Union County—ss.

"Be it remembered that on the third day of February, 1873, before me, a Notary Public of the State of New Jersey, personally appeared Abram S. Mitchell, who is known to me to be the individual who has subscribed the within instrument, upon being duly sworn, doth depose, and on his oath say that the several matters stated therein are correct and true.

SAMUEL S. MOORE,
Notary Public.

(SEAL.)

Report of
Commissioners on the
part of the United States
appointed to examine
M., K. & T. Railway.
Filed January, 1873.

Department of the
Interior.
Jan.
29,
1873.

"State of Iowa, Dubuque County—ss.

"Be it remembered that on this 7th day of February, A. D. 1873, before me a Notary Public of Iowa in and for Dubuque County, personally appeared Wm. Vandever, who is personally known to me to be the identical person who subscribed the within instrument, and being duly sworn upon his oath, deposes and says that the matters and things therein stated are correct and true.

WM VANDEVER, JR.,

(SEAL.) Notary Public.

"State of Kansas, County of Leavenworth—ss.

"Be it remembered that on this 18th day of February, A. D. 1873, before me, a Notary Public of Kansas and for Leavenworth County, personally appeared Walter

L. Mayo, who is personally known to me to be the identical person who subscribed the within instrument, and being duly sworn upon his oath, deposes and says: The matters and things therein stated are correct and true.

(SEAL.)

J. W. NEIHAUS,
Notary Public.

'CHIEF ENGINEER'S OFFICE.
MO., KAN. AND TEX. RAILWAY.

SEDALIA, Jan. 13, 1873.

'To the Board of Government Commissioners Appointed to Inspect the Missouri, Kansas and Texas Railway.

'GENTLEMEN:—The Section of Railway which is offered for your inspection extends from the North Bank of the Arkansas River to the Red River, which is the boundary line between the Indian Territory and the State of Texas, a distance of 155.35 miles, and it is built in all respects fully up to the standard of first-class Western Railroads.

'The alignment of the Section is very direct, being made up generally of long tangents and light curves, and adheres so nearly to the air line that the excess in length of located line over air line is but 3.44 miles, showing a loss in distance over an air line of only about 2 per cent. 81 per cent of line is made up of tangents and 19 per cent of curved line, with shortest radius of 1,432 ft. and longest radius of 22,920 ft.

	MILES.
Total length of tangent is	126.02
Total length, curves under 1 deg. rad. 22,920 to 5,730 ft. is	5.93
Total length, curves, 1 deg. to 2 deg., rad. 5,730 to 2,865 ft. is	15.81

Total length, curves, 2 deg. to 3 deg. rad., 2,865 to 1,910 ft. is	7.43
Total length, curves 3 deg. to 4 deg,, rad. 1,910 to 1,432 ft. is	0.16
Total	155.35

	Miles.
Longest tangent is	7.00
Longest curve is	0.75

'The grades upon a considerable portion of the line are level, while the maximum grade is 52.8 ft. per mile, equal to one foot rise in 100 ft. Care has been taken to raise all grades across streams, bottom lands, and other low places high enough to be above the highest floods known to the country.

'The grades are as follows:

	Miles.
Level grade	36.63
Level to 10 ft	9.00
10. ft to 20 ft	15.95
20 ft. to 30 ft	21.21
30 ft. to 40 ft	36.96
40 ft. to 52.8 ft	35.60
Total	155.35

	Miles.
The longest level grade is	0.87
The longest maximum grade is	1.40

	Per Cent.
Per cent of level grades	23 1-2
Per cent of maximum grade is	11

'Masonry and Bridges.

'All the masonry on the line is of the best of its class, and no timber, trestle or pile bridges are used until a

point within 42 miles of Red River is reached, where no stone could be found suitable for railroad purposes, and the railway company was obliged to resort to pile and trestle work for a greater part of this distance.

'The bridges across the larger streams, to-wit: the Arkansas, North Fork of Canadian and South Canadian Rivers are all built on piers and abutments of first-class hammer dressed masonry, laid in hydraulic cement with foundations all sunk to bed rock. Rock for masonry has, in many instances, been hauled long distances, that for the Arkansas bridge having been hauled with teams a distance of 9 miles.

'All bridges exceeding 20 ft. span and less than 50 ft. are of the class known as trussed girders, having their supports or truss of iron placed underneath the track.

'Spans of 58 and 68 ft. are of the well-known Howe Truss Pattern, and all spans of over 68 ft. in length are of the pattern known as the "Post Combination Diagonal Truss," having the bottom chords and all other parts having a tension strain of best wrought iron, while the parts sustaining compression strains only are of wood, and the pieces of timber are in all cases thoroughly "Burnettized," passing through a chemical process, which it is believed will add fully 100 per cent to the life of the timber.

'In addition to this precaution it is intended to house in the top chords and paint the posts and studs so that it is believed that the timber work will last at least 20 years.

'The pile and trestle bridges used on the 42 miles nearest Red River are built according to the usual plans.

'The piles and trestle bents being of oak timber, and the stringers of pine, all thoroughly framed and bolted together and well secured by lateral and diagonal bracing.

'The bridges upon this section are as follows:

Arkansas River, 845 ft. long, 4 spans, 200 ft. each, and 1 45-ft. girder.

Coodeys Creek	68 ft. long
Butler Creek	88 ft. long
Elk Creek No. 1	108 ft. long
Elk Creek No. 3	108 ft. long
Elk Creek No. 4	58 ft. long
Elk Creek No. 4 (Howe Truss)	58 ft. long
Elk Creek No. 5	108 ft. long
Elk Creek No. 6	88 ft. long

North Fork Canadian, 409 ft. long, 2 spans, truss and 2 girders. Canadian River, 545 ft. long, 3 spans, truss and 1 girder.

Turkey Creek No. 1	88 ft. long
Turkey Creek No. 2	88 ft. long
Rock Creek	149 ft. long
Coal Creek	149 ft. long
Perryville Creek	88 ft. long
Ward's Creek	109 ft. long
Limestone Creek	118 ft. long
North Boggy River	169 ft. long
Middle Boggy River	169 ft. long
South Boggy River	169 ft. long
Davis Cr. No. 1	88 ft. long
Davis Cr. No. 2	68 ft. long
Davis Cr. No. 3	68 ft. long
Davis Cr. No. 4	68 ft. long
Blue River	149 ft. long

West Fork Mineral Bayou	68 ft. long
Mineral Bayou	68 ft. long
Island Bayou	119 ft. long
Red River	570 ft. long

Of stringer bridges ranging from 6 to 20 ft. clear opening with masonry abutments, there are 114. Of trussed girders, 30 ft. clear span, there are 16. Of trussed girders of 40 feet there are 21. Of trestle and pike bridges there are 5,706 lineal feet.

'TRACK AND BALLAST.

'The track is laid with best English iron weighing 56 lbs. per lineal yard, with "fish-plate" joints, full spiked with 4 spikes to each tie.

'The track is ballasted throughout, generally with the top earth or mould. Some short sections are ballasted, with broken rock, and several miles in the aggregate with sand, which is found in several places along the line of the road. It is intended eventually to ballast the whole line with broken rock, and two rock-crushers are already purchased for that purpose, and will be put into operation in the spring.

'TIES.

'The ties are all of white, burr and post oak. They are 8 feet long, hewed on opposite sides, 6 inches thick, and 8 inches face on each side, and in size are considerably above the standard required. The ties are all laid two feet from center to center, making 2,640 per mile.

'SIDE TRACK.

'There are fourteen side tracks on this section, as follows:

Muskogee	3,886 ft.
Oak-taha	1,255 ft.

North Fork	1,357 ft.
Grayson spur	547 ft.
South Canadian	1,595 ft.
Reams	1,056 ft.
McAllister	6,752 ft.
Perryville	2,100 ft.
Limestone Gap	2,593 ft.
Atoka	3,525 ft.
Caney	850 ft.
Caddo	2,560 ft.
Durant	1,400 ft.
Red River	3,500 ft.
Total	32,976 ft.

equal to 6 24-100 miles, or over 4 per cent of entire line.

'Embankments and Cuts.

'The embankments have all been built twelve feet wide at grade line, for those less than six feet high, and fourteen feet wide for those exceeding six feet high. In some places the fall rains have washed a portion of embankments, but all deficiencies are being made good by construction trains. All cuts, both earth and rock, are taken out twenty feet wide at grade line, and all cuts are well ditched so as to give proper drainage, and keep the roadbed in good condition.

'Depots and Water Stations.

'There are five depots on this section as follows:
Muskogee Depot and Round House.
North Fork depot.
Atoka Depot and Turntable.
Caddo Depot.
Red River Depot and Turntable.
There are also water stations at:

Elk Cr.
Jones Cr.
Turkey Cr. No. 1.
Turkey Cr. No. 2.
Perryville Cr.
Limestone Gap.
Middle Boggy.
South Boggy.
Blue River.
Mineral Bayou.

'ROLLING STOCK.

'As the Company is now operating 643 miles of completed railway only about one-third of which is located in the Indian Territory, an enumeration of the particular locomotives, cars, etc., belonging to this portion of the road is impossible. The road is well equipped throughout with rolling stock of all kinds sufficient to do all business likely to offer for many months to come. No machine shops are located in the Indian Territory, but very large manufacturing shops are being constructed at Parsons, 26 miles north of the southern boundary of Kansas, which, when completed, will cover 5 acres of ground. Repair shops will also be built at Denison, Texas, the present southern terminus of the road and five miles south of Red River.

'Accompaning this report is a map showing the alignment topography near the line, crossings of streams, location of side tracks and depots.

'Also a profile showing the grades, cuts, fills, location and character of bridges and culverts.

'Both map and profile have been made as complete as possible.

'I have the honor to be, Very respectfully,

Your obedient servant,

O. B. GUNN.

Chief Engineer Mo. and Texas Railway.'

"(Endorsed)—Report of the Chief Engineer of the Missouri-Texas Railway to the Government Board of Commissioners appointed to inspect the 2nd and last section in the Indian Territory—Jan. 13, 1873—Department of the Interior, Jan. 29, 1873.

Lands and Railroads.

DEPARTMENT OF THE INTERIOR,

Washington, D. C., 10th March, 1873.

"Department of the Interior. March 12, 1873.

SIR: I have the honor to transmit herewith, for your action, the report—dated 13th January, 1873—of Messrs. Vandever, Mitchell & Mayo, Commissioners, appointed by you on the 9th December last, to examine and report upon the Missouri, Kansas and Texas Railway from the 86.76 mile (south of the southern boundary line of Kansas) to Red River, near Preston, Texas, a distance of 155.35 miles.

The Commissioners in their report state that the road is constructed in a good, substantial and workmanlike manner, as required by the law and the instructions of the Department, with the exception of the ballasting. I respectfully recommend the acceptance of said portion of road, on condition that the ballasting be here-

after made to conform to the requirements of this Department. Very respectfully,

Your obedient servant,

B. R. COWEN,
Acting Secretary.

"To the President.

(Endorsed)—'Mo., Kansas & Texas—Department of the Interior, 10th March, 1873. B. R. Cowen, Acting Secretary—submits to the President report of Commissioners on 155.35 miles of Mo., K. & T. Ry. (Notified Prest. of Co., Comr. G. L. O. Actg. Comr. Indn. Affairs, 12th March, 1873.'

"Executive Mansion, March 11th, '73. The within recommendations are approved. U. S. GRANT."

EXHIBIT 9

BOND OF THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY TO THE UNITED STATES OF AMERICA.

"Know All Persons by These Presents:

That we, the Missouri, Kansas and Texas Railway Company (formerly the Union Pacific Railway Company, Southern Branch), a corporation organized under the laws of the State of Kansas, and
are held and firmly bound unto the United States of America in the penal sum of five hundred thousand ($500,000) dollars, money of the said United States; to which payment, well and truly to be made, we bind ourselves, jointly and severally, our joint and several heirs, executors, administrators, successors and assigns, firmly by these presents.

Signed by the President of the Missouri, Kansas and (U. S. Int. Rev.) Texas Railway Company, and at-
(Stamp) tested by the Secretary thereof un-
(One Dollar.) der its seal, and signed with our hands and sealed with our seals this sixth day of August, in the year eighteen hundred and seventy.

The condition of the foregoing obligation is such, That whereas the said Missouri, Kansas and Texas Railway Company has received the written approval of the President of the United States to construct and operate its line of railroad from the termination of their completed road on the southern boundary of the State of Kansas, through the Indian Territory, to a point at or near Preston, in the State of Texas, with a Branch from at or near Fort Gibson, in said Territory, to Fort Smith, in the State of Arkansas, upon the conditions prescribed, which are as follows, to-wit:

That said trunk road and branch "shall be made upon the easiest grades and curves which are practicable; its roadbed raised above the reach of floods and thoroughly drained; its bridges and culverts of solid, durable and approved construction; its ties not less than 2700 to the mile, and of hard wood; its rails not less than 56 pounds weight to the yard, thoroughly coupled with the fish joints and the road, throughout its complete length before it shall be finally accepted, well ballasted with stone or gravel, and fully furnished with side tracks, water and fuel stations, and rolling stock, up to the standard required of the railways to the Pacific Ocean." "For the purpose of securing such construction" "a Commission of three competent persons (are to) be appointed, whose certificate shall be required in similar manner, and who shall be paid by said Company, at the same rate as was done in the case of the Union Pacific Railroad to the Pacific Ocean."

And upon the further condition that said Company "shall, in every particular, respect the rights of said Indian tribes, and the individuals thereof, as guaranteed by the treaties, and the intercourse and other statutes of the United States; that they shall commit no waste upon said Indian lands, nor take materials therefrom, except under contract with said Indian tribes, or individuals thereof, who may make sales of individual property; such contracts, whether with the nations or individuals, to be valid only when approved by the proper officers of the Indian Department."

Now, if the said Missouri, Kansas and Texas Railway Company, their successors and assigns, shall truly and faithfully comply with the conditions and requirements herein set forth, then this obligation shall be null, void,

and of no effect; otherwise to remain and be in full force and virtue.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY,
By
LEVI PARSONS, President.
H. B. HENSON, Secretary.

(Seal)
(M., K. & T.)
(Ry. Co.)
(1870.)

Attest:
H. B. HENSON,
Secty.

United States of America,)
Southern Dist. of New York,) ss.:

Be it remembered, on this tenth day of August, in the year one thousand eight hundred and seventy, before me, James Betts Metcalf, a United States Commissioner duly appointed by the Circuit Court of the United States for the Southern District of New York, in the Second Circuit; came Levi Parsons and H. B. Henson, to me personally known and also known to me to be, respectively, the President and Secretary of the Missouri, Kansas and Texas Railway Company, the corporation described in the foregoing instrument, who, being by me severally sworn, each for himself did depose and say as follows:

The said Levi Parsons, that he resided in the City of New York; that he was President of the Missouri, Kansas and Texas Railway Company, and that he executed the foregoing instrument as President of said Company, by order of the Board of Directors thereof. The said H. B. Henson, that he resided in the City of Brooklyn, in the State of New York; that he was Secre-

tary of the Missouri, Kansas and Texas Railway Company; that he knew the corporate seal of said Company; that the seal affixed to the foregoing instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said Company, and that he signed his name thereto, by the like order, as Secretary of said Company.

Witness my hand and official seal the day and year aforesaid.

JAMES BETTS METCALF,
United States Commissioner.

(Seal)
(U. S. Commissioner)
(Metcalf,)
(So. Dist. of New York.)

EXHIBIT 10

PROPOSITIONS SUBMITTED BY THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY TO THE JOINT COMMISSIONS OF THE UNITED STATES AND CHEROKEE NATION.

The Missouri, Kansas and Texas Railway Company (formerly Union Pacific Railway Company, Southern Branch) has been built, operated and maintained through the Indian Territory under authority of the Act of Congress of July 25, 1866, entitled "An Act granting lands to the State of Kansas to aid in the construction of the Kansas and Neosho Valley Railroad and its extension to Red River." See pamphlet "Laws and Executive Documents" herewith submitted, pages 13 to 19 inclusive.

By section 9 of that Act it was provided that should the Union Pacific Railway Company, Southern Branch (now Missouri, Kansas and Texas Railway Company) first complete its road to the southern boundary line of Kansas, the northern boundary line of the Indian Territory, then it should be authorized upon obtaining the written consent of the President of the United States, to build, maintain and operate its road through the Indian Territory.

About the beginning of 1870 a controversy arose between the contending railroad companies as to which had acquired the right to build across the Territory, which was settled in favor of the Missouri, Kansas and Texas Railway Company, by the decisions of the Secretary of the Interior of May 21, 1870, approved by President Grant, May 23, 1870, and of July 12, 1870, approved by the President July 20, 1870. See pamphlet, pages 25 to 40, and pages 41 to 48.

On July 22, 1870, official notice by the Secretary of the Interior was given to the said railway company that it was authorized to build, and contained the requirements with which it should comply, also directed the map of its route to be filed with the Secretary of the Interior, and that a bond be given to the United States for the completion of road in conformity to the specified standard. See pamphlet, pages 49 and 50.

Subsequently the road was built, commissioners were appointed by the President to examine the same, and their reports made, finding that the road had been built according to specifications, and recommending its acceptance. (See pamphlet, pages 54 to 64, and pages 64 to 77.) There were two of these reports, the first covering the road from the southern boundary of the State of Kansas to the Arkansas River, and the other from the Arkansas River to Red River, the first dated December 21, 1871, and approved by the President May 17, 1872, and the second dated January 13, 1873, and approved March 11, 1873.

By sections 6 and 8 of said Act of Congress of July 25, 1866, reading them together, the right of way was granted to the said railway through the Territory, to the extent of one hundred feet in width on each side of the road; also all necessary ground for station buildings, workshops, depots, machine shops, switches, side tracks, turntables and water stations, together with the right to take from adjacent lands, material for the construction of the road.

By the eleventh article of the treaty between the United States and the Cherokee Nation, proclaimed August 11th, 1866, the right of way was granted through the lands of the Cherokee Nation to the railroad company authorized by Congress to construct a railroad from north to south through that Nation.

The right of way of the said railway company through the Indian Territory is clearly two hundred feet in width, one hundred feet on each side of the road, and is shown in the map filed with the Secretary of the Interior. The station grounds of the railway are shown on maps and filings of record in the office of the Secretary of the Interior. These rights as we claim them have been generally recognized, and the position of the railway company is that no treaty which may be made should contain anything which will interfere with its rights of way and station grounds thus solemnly conferred by Congress.

On the contrary, the railway company submits that a provision should be inserted substantially of the following purport:

> "That all rights of way granted to railroad corporations whose lines have heretofore been constructed, and at the time of the taking effect of this treaty are being operated, and those granted by Act of Congress which are now in the course of construction or are hereafter constructed, as provided in the Act or Acts of Congress granting the right, together with such lands as they were or are authorized to take or acquire for depots or station grounds, sidings, and freight or storage purposes, are hereby confirmed."

We submit that there should be a further provision in the treaty to the effect that the railway companies shall be permitted to retain any side, spur, extension or branch tracks which they may have constructed, acquired or leased as feeders to their main lines on paying to the Nations the reasonable value of their interest in the lands, the right of way therefor not to exceed one hundred feet, and the compensation to be paid for such

right of way, if not agreed upon by the parties, to be determined by a suit to be instituted by either party in the United States Court for the Indian Territory.

LAND GRANT.

The railway company acquired its land grant in the Indian Territory under the said Act of Congress of July 25, 1866. (Pamphlet, pages 13 to 19. See specially sections 1 and 9.) There is no question but the company has complied with all the conditions of the grant. It has built, maintained and operated its railway through the Indian Territory as required by the Act and the conditions prescribed by the President. The company's contention is that at the time of the grant the United States held the title to the lands in the Indian Territory, subject to the right of occupancy by the Indian Nations in their communal capacity, and the grant to the company was of the estate in remainder.

The treaty should contain a provision to the effect that the allotments provided for shall not impair any rights heretofore granted by Congress.

We suggest the following provision:

"Whereas, The Missouri, Kansas and Texas Railway Company claims an interest in the lands in the Cherokee Nation under the Act of Congress of the United States of July 25, 1866, which is not conceded by said Nation; therefore, the said lands are withheld for the present from the allotment herein provided for, but such reservation is not to be construed as a concession in any way on the part of the parties hereto or either of them, that the railway company has any interest in such lands. And provided, further, that said lands may be sold under the direction of the United States, and the proceeds held

for the Cherokee Nation or the railway company, one or both, to be paid to whichever of said parties it shall ultimately be determined said proceeds belong, and such determination may be had either by mutual agreement between the Cherokee Nation and said railway company or by some court to whose decision the matter may be committed by joint agreement of the Cherokee Nation and said railway company, or by an Act of the Congress of the United States."

Respecting coal and mineral lands, we should say that it is our understanding that there is a prevailing sentiment among the Cherokees that the coal and minerals should go with the lands and not be reserved to the Nation. This company would be satisfied with such a disposition of this question. If, however, it should be determined that the coal and mineral lands are to be reserved, then we submit that provision should be made by which the royalty exacted will be reasonable, and such as to permit competition, and further that the royalty required to be paid may be flexible, providing that the same be reduced in some proper proportion to the per diem tonnage. To illustrate our views, if a coal mine produces an average of 1,000 tons per day the royalty paid for a less tonnage may be reduced in some given proportion.

ALIENATION.

The position of the railway company touching the question of what restrictions upon alienation shall be imposed upon individual Indians after they have received their allotment is, that the treaty should give full dominion to the individual owner. If restrictions are imposed upon his right of alienation, then he would not have full dominion over his own. Whatever title passes to the individual should be subject to disposition by him

just as fully as by citizens of adjoining states. Those lands which are partitioned to individuals should be subject to unrestricted sale and lease. Only by such system will there be a full development of the Territory. If any restrictions are to be imposed upon alienation, they should be only as to a part of the land in the nature of a homestead, and that only for a limited period.

PLAN FOR PRESERVING IN EFFECT THE CONTINUITY OF THE TRIBAL RELATIONS OF THE FULL BLOOD INDIAN.

When the lands of the Nations come to be allotted as herein provided, as many of the Indians of either Nation of full blood as may desire to do so may elect to take their allotments adjacent to each other, within an area subject to the approval of the Commission, and have the United States convey the lands to some corporation to be organized by such full blood Indians, and to be held for their joint use, so that such lands may be held by such full blood Indians under a communal title, similar to that under which the Nations have heretofore held the titles for the joint use of all Indian citizens.

EXHIBIT 11

PROPOSITIONS SUBMITTED BY THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY TO THE JOINT COMMISSIONS OF THE UNITED STATES, THE CHOCTAW AND CHICKASAW NATIONS.

The Missouri, Kansas & Texas Railway Company (formerly Union Pacific Railway Company, Southern Branch), has been built, operated and maintained through the Indian Territory under authority of the Act of Congress of July 25, 1866, entitled, "An Act granting lands to the State of Kansas to aid in the construction of the Kansas & Neosho Valley Railroad and its extension to Red River." See pamphlet "Laws and Executive Documents" herewith submitted, pages 13 to 19 inclusive.

By Section 9 of that Act it was provided that should the Union Pacific Railway Company, Southern Branch (now Missouri, Kansas & Texas Railway Company) first complete its road to the Southern boundary line of Kansas, the northern boundary line of the Indian Territory, then it should be authorized upon obtaining the written consent of the President of the United States, to build, maintain and operate its road through the Indian Territory.

About the beginning of 1870 a controversy arose between the contending railroad companies as to which had acquired the right to build across the Territory, which was settled in favor of the Missouri, Kansas & Texas Railway Company, by the decisions of the Secretary of the Interior of May 21, 1870, approved by President Grant, May 23, 1870, and of July 12, 1870, approved by the President July 20, 1870. See pamphlet pages 25 to 40, and pages 41 to 48.

On July 22, 1870, official notice by the Secretary of the Interior was given to the said Railway Company that it was authorized to build, and contained the requirements with which it should comply, also directed the map of its route to be filed with the Secretary of the Interior, and that a bond be given to the United States for the completion of road in conformity to the specified standard. See pamphlet pages 49 and 50.

Subsequently, the road was built, Commissioners were appointed by the President to examine the same, and their reports made, finding that the road had been built according to specifications, and recommending its acceptance. (See pamphlet pages 54 to 64 and pages 64 to 77.) There were two of these reports, the first covering the road from the Southern boundary of the State of Kansas to the Arkansas River, and the other from the Arkansas River to Red River, the first dated December 21, 1871, and approved by the President May 17, 1872, the second dated January 13, 1873, and approved March 11, 1873.

By Sections 6 and 8 of said Act of Congress of July 25, 1866, reading them together, the right of way was granted to the said Railway through the Territory, to the extent of one hundred feet in width on each side of the road; also all necessary ground for station buildings, workshops, depots, machine shops, switches, side-tracks, turntables and water stations, together with the right to take from adjacent lands material for the construction of the road.

By the sixth Article of the treaty between the United States and the Choctaw and Chickasaw Nations, proclaimed July 10, 1866, the right of way was granted through their lands to the railroad company which should be authorized by Congress to construct a railroad from north to south through those Nations.

The right of way of the said Railway Company through the Indian Territory is clearly two hundred feet in width, one hundred feet on each side of the road, and is shown in the map filed with the Secretary of the Interior. The station grounds of the railway are shown on maps and filings of record in the office of the Secretary of the Interior. These rights as we claim them have been generally recognized, and the position of the Railway Company is that no treaty which may be made should contain anything which will interfere with its rights of way and station grounds thus solemnly conferred by Congress.

On the contrary, the Railay Company submits that a provision should be inserted substantially of the following purport:

"That all rights of way granted to railroad corporations whose lines have heretofore been constructed, and at the time of the taking effect of this treaty are being operated, and those granted by Act of Congress which are now in the course of construction or are hereafter constructed, as provided in the Act or Acts of Congress granting the right, together with such lands as they were or are authorized to take or acquire for depots or station grounds, sidings, and freight or storage purposes, are hereby confirmed."

We submit that there should be a further provision in the treaty to the effect that the railway companies shall be permitted to retain any side, spur, extension or branch tracks which they may have constructed, acquired or leased as feeders to their main lines on paying to the Nations the reasonable value of their interest in the lands, the right of way therefor not to exceed one hundred feet, and the compensation to be paid for such right of way, if not agreed upon by the parties, to be

determined by a suit to be instituted by either party in the United States Court for the Indian Territory.

Respecting coal lands we contend:

The rights of all parties to the existing leases should be protected, those of the lessors and the lessees, and of the Nations. Jutice would seem to require that any diminution made in the royalties paid, should be a pro-rata reduction of the royalties heretofore paid under existing leases. A reduction in the royalties seems imperative in order that the coal mines of the Territory may maintain themselves in competition with the outside mines. There should be a provision that the royalties may be flexible and reduced, if to the interest of all. Such reduction should be authorized on something of a sliding scale when the output of the mines is large.

We have examined the propositions formally presented by the coal interests represented by some of the companies, and in the main agree with them. We suggest amendments by inserting in the first line the words "lessors and" before the words "holders or owners". In the second line of the fifth paragraph after the word "cents" add "to be divided between the nations and the individual lessors pro-rata as now paid under existing leases."

Whether the provisions contained in the last three lines of paragraph 7 touching future leases should be retained, depends on the policy to be pursued respecting undiscovered coal lands, whether they are to be held by the Nations or subject to individual allotment.

LAND GRANT:

The Railway Company acquired its land grant in the Indian Territory under the said Act of Congress of July 25, 1866. (Pamphlet, pages 13 to 19. See specially sections 1 and 9.) There is no question but the Company

has complied with all the conditions of the grant. It has built, maintained and operated its railway through the Indian Territory as required by the Act and the conditions prescribed by the President. The Company's contention is that at the time of the grant the United States held the title to the lands in the Indian Territory, subject to the right of occupancy by the Indian Nations in their communal capacity, and the grant to the Company was of the estate in remainder.

The treaty should contain a provision to the effect that the allotments provided for shall not impair any rights heretofore granted by Congress.

We suggest the following provision:

"Whereas, the Missouri, Kansas & Texas Railway Company claims an interest in the lands in the (Choctaw, Cherokee and Chickasaw) Nations under the Act of Congress of the United States of July 25, 1866, which is not conceded by said Nation; therefore, the said lands are withheld for the present from the allotment herein provided for, but such reservation is not to be construed as a concession in any way on the part of the parties hereto or either of them, that the said Railway Company has any interest in such lands."

ALIENATION.

The position of the Railway Company touching the question of what restrictions upon alienation shall be imposed upon individual Indians after they have received their allotments is, that the treaty should give full dominion to the individual owner. If restrictions are imposed upon his right of alienation, then he will not have full dominion over his own. Whatever title passes to the individual should be subject to disposition by him just as fully as by citizens of adjoining states. Those

lands which are partitioned to individuals should be subject to unrestricted sale and lease. Only by such system will there be a full development of the Territory. If any restrictions are to be imposed upon alienation, they should be only as to a part of the land in the nature of a homestead, and that only for a limited period.

PLAN FOR PRESERVING IN EFFECT THE CONTINUITY OF THE TRIBAL RELATIONS OF THE FULL BLOOD INDIAN.

When the lands of the Nations come to be allotted as herein provided, as many of the Indians of either Nation of full blood as may desire to do so may elect to take their allotments adjacent to each other, within an area subject to the approval of the Commission, and have the United States convey the lands to some corporation to be organized by such Full Blood Indians, and to be held for their joint use, so that said lands may be held by such Full Blood Indians under a communal title, similar to that under which the Nations have heretofore held the titles for the joint use of all Indian citizens.

EXHIBIT 12

"PROPOSITIONS SUBMITTED BY THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY TO THE JOINT COMMISSIONS OF THE UNITED STATES AND CREEK NATION."

"Muskogee, Sept. 24, 1897.

"The Missouri, Kansas & Texas Railway Company (formerly Union Pacific Railway Company, Southern Branch), has been built, operated and maintained through the Indian Territory under the authority of the Act of Congress of July 25, 1866, entitled 'An Act granting lands to the State of Kansas to aid in the construction of the Kansas & Neosho Valley Railroad and its extensions to Red River.' See pamphlet 'Laws and Executive Documents' herewith submitted, pages 13 to 19 inclusive.

"By Section 9 of that Act it was provided that should the Union Pacific Railway Company, Southern branch (now Missouri, Kansas & Texas Railway Company), first complete its road to the Southern boundary line of Kansas, the Northern boundary line of the Indian Territory, then it should be authorized upon obtaining the written consent of the President of the United States to build, maintain and operate its road through the Indian Territory.

"About the beginning of 1870 a controversy arose between the contending railroad companies as to which had acquired the right to build across the Territory, which was settled in favor of the Missouri, Kansas & Texas Railway Company, by the decisions of the Secretary of the Interior of May 21, 1870, ap-

proved by President Grant, May 23, 1870, and of July 12, 1870, approved by the President July 20, 1870. See pamphlet, pages 25 to 40 and pages 41 to 48.

"On July 22, 1870, official notice by the Secretary of the Interior was given to the said Railway Company that it was authorized to build, and contained the requirements with which it should comply, also directed the map of its route to be filed with the Secretary of the Interior, and that a bond be given to the United States for the completion of road in conformity to the specified standard. See pamphlet, pages 49 and 50.

"Subsequently the road was built, Commissioners were appointed by the President to examine the same, and their reports made, finding that the road had been built according to specifications, and recommending its acceptance. (See pamphlet, pages 54 to 64 and pages 64 to 77).

"There were two of these reports, the first covering the road from the Southern boundary of the State of Kansas to the Arkansas River, and the other from the Arkansas River to Red River, the first dated December 21, 1871, and approved by the President May 17, 1872, the second dated January 13, 1873, and approved March 11, 1873.

"By Sections 6 and 8 of said Act of Congress of July 25, 1866, reading them together, the right-of-way was granted to the said railway through the Territory, to the extent of one hundred feet in width on each side of the road; also all necessary ground for station buildings, workshops, depots, machine shops, switches, sidetracks, turntables and water

stations, together with the right to take from adjacent lands material for the construction of the road.

"By the fifth Article of the treaty between the United States and the Creek Nation, proclaimed August 11th, 1866, the right-of-way was granted through the lands of the Creek Nation to the railroad company authorized by Congress to construct a railroad from north to south through that Nation.

"The right-of-way of the said Railway Company through the Indian Territory is clearly two hundred feet in width, one hundred feet on each side of the road, and is shown in the map filed with the Secretary of the Interior. The station grounds of the railway are shown on maps and filings of record in the office of the Secretary of the Interior. These rights as we claim them have been generally recognized, and the position of the Railway Company is that no treaty which may be made should contain anything which will interfere with its rights-of-way and station grounds thus solemnly conferred by Congress.

"On the contrary, the Railway Company submits that a provision should be inserted substantially of the following purport:

'That all rights-of-way granted to railroad corporations whose lines have heretofore been constructed, and at the time of the taking effect of this treaty are being operated, and those granted by Act of Congress which are now in the course of construction or are hereafter constructed, as provided in the Act or Acts of Congress granting the right, together with such lands as they were or are authorized to

take or acquire for depots or station grounds, sidings, and freight or storage purposes, are hereby confirmed.'

"We submit that there should be a further provision in the treaty to the effect that the railway companies shall be permitted to retain any side, spur, extension or branch tracks which they may have constructed, acquired or leased as feeders to their main lines on paying to the Nation the reasonable values of their interest in the lands, the right-of-way therefor not to exceed one hundred feet, and the compensation to be paid for such right-of-way, if not agreed upon by the parties, to be determined by a suit to be instituted by either party in the United States Court for the Indian Territory.

'LAND GRANT.

"The Railway Company acquired its land grant in the Indian Territory under the said Act of Congress of July 25, 1866. (Pamphlet, pages 13 to 19. See specially Sections 1 and 9.) There is no question but the Company has complied with all the conditions of the grant. It has built, maintained and operated its railway through the Indian Territory as required by the Act and the conditions prescribed by the President. The Company's contention is that at the time of the grant the United States held the title to the lands in the Indian Territory, subject to the right of occupancy by the Indian Nations in their communal capacity, and the grant to the Company was of the estate in remainder.

"The treaty should contain a provision to the effect that the allotments provided for shall not impair any rights heretofore granted by Congress.

"We suggest the following provision:

'Whereas, the Missouri, Kansas & Texas Railway Company claims an interest in the lands in the Creek Nation under the Act of Congress of the United States of July 25, 1866, which is not conceded by said Nation; therefore, the said lands are withheld for the present from the allotment herein provided for, but such reservation is not to be construed as a concession in any way on the part of the parties hereto or either of them, that the said Railway Company has any interest in such lands. And provided further that said lands may be sold under the direction of the United States, and the proceeds held for the Creek Nation or the said Railway Company, one or both, to be paid to whichever of said parties it shall be ultimately determined said proceeds belong, and such determination may be had either by mutual agreement between the Creek Nation and said Railway Company or by some court to whose decisions the matter may be committed by joint agreement of the Creek Nation and said Railway Company, or by an Act of the Congress of the United States."

"Respecting coal and mineral lands, we would say that it is our understanding that there is a prevailing sentiment among the Creeks that the coal and minerals should go with the lands and not be reserved to the Nation. This Company would be satisfied with such disposition of this question. If, however, it should be determined that the coal and mineral lands are to be reserved, then we submit that provision should be made by which the royalty exacted will be reasonable, and such as to permit competition, and further that the royalty required to be paid may be flexible, providing that the same

be reduced in some proper proportion to the per diem tonnage. To illustrate our views, if a coal mine produces an average of 1,000 tons per day the royalty paid for a less tonnage may be reduced in some given proportion."

EXHIBIT 13

LEGISLATION AND TREATIES AFFECTING WORK OF THE COMMISSION TO THE FIVE CIVILIZED TRIBES AND THE ALLOTMENT OF LANDS.

[Act of March 3, 1893 (27 Stat. L., 645).]

SEC. 16. The President shall nominate and, by and with the advice and consent of the Senate, shall appoint three commissioners to enter into negotiations with the Cherokee Nation, the Choctaw Nation, the Chickasaw Nation, the Muscogee (or Creek) Nation, the Seminole Nation, for the purpose of extinguishment of the national or tribal title to any lands within that territory now held by any and all of such nations or tribes, either by cession of the same or some part thereof to the United States, or by the allotment and division of the same in severalty among the Indians of such nations or tribes, respectively, as may be entitled to the same, or by such other method as may be agreed upon between the several nations and tribes aforesaid, or each of them, with the United States, with a view to such an adjustment, upon the basis of justice and equity, as may, with the consent of such nations or tribes of Indians, so far as may be necessary, be requisite and suitable to enable the ultimate creation of a State or States of the Union which shall embrace the lands within said Indian Territory.

The commissioners so appointed shall each receive a salary, to be paid during such time as they may be actually employed, under direction of the President, in the duties enjoined by this act, at the rate of five thousand dollars per annum, and shall also be paid their reasonable and proper expenses incurred in prosecution of the objects of this act, upon accounts therefor to be

rendered to and allowed by the Secretary of the Interior from time to time. That such commissioners shall have power to employ a secretary, a stenographer, and such interpreter or interpreters as may be found necessary to the performance of their duties, and by order to fix their compensation, which shall be paid, upon the approval of the Secretary of the Interior, from time to time, with their reasonable and necessary expenses, upon accounts to be rendered as aforesaid; and may also employ, in like manner and with the like approval, a surveyor or other assistant or agent, which they shall certify in writing to be necessary to the performance of any part of their duties.

Such commissioners shall, under such regulations and directions as shall be prescribed by the President, through the Secretary of the Interior, enter upon negotiation with the several nations of Indians as aforesaid in the Indian Territory, and shall endeavor to procure, first, such allotment of lands in severalty to the Indians belonging to each such nation, tribe, or band, respectively, as may be agreed upon as just and proper to provide for each such Indian a sufficient quantity of land for his or her needs, in such equal distribution and apportionment as may be found just and suited to the circumstances; for which purpose, after the terms of such an agreement shall have been arrived at, the said commissioners shall cause the land of any such nation, or tribe, or band to be surveyed and the proper allotment to be designated; and, secondly, to procure the cession, for such price and upon such terms as shall be agreed upon, of any lands not found necessary to be so allotted or divided, to the United States; and to make proper agreements for the investment or holding by the United States of such moneys as may be paid or agreed to be paid to such nation, or tribes, or bands, or to any

of the Indians thereof, for the extinguishment of their title therein. But said commissioners shall, however, have power to negotiate any and all such agreements as, in view of all the circumstances affecting the subject, shall be found requisite and suitable to such an arrangement of the rights and interests and affairs of such nations, tribes, bands, or Indians, or any of them, to enable the ultimate creation of a Territory of the United States with a view to the admission of the same as a State in the Union.

The commissioners shall, at any time, or from time to time, report to the Secretary of the Interior their transactions and the progress of their negotiations, and shall, at any time, or from time to time, if separate agreements shall be made by them with any nation, tribe, or band in pursuance of the authority hereby conferred, report the same to the Secretary of the Interior for submission to Congress for its consideration and ratification.

For the purposes aforesaid there is hereby appropriated, out of any moneys in the Treasury of the United States, the sum of fifty thousand dollars, to be immediately available.

Neither the provisions of this section nor the negotiations or agreements which may be had or made thereunder shall be held in any way to waive or impair any right of sovereignty which the Government of the United States has over or respecting said Indian Territory or the people thereof, or any other right of the Government relating to said Territory, its lands, or the people thereof.

Approved March 3, 1893.

[Act of March 2, 1895 (28 Stat. L., 939).]

For continuing the work of the Commission appointed under section sixteen of the act entitled "An act making appropriations for current and contingent expenses and fulfilling treaty stipulations with Indian tribes for fiscal year ending June thirtieth, eighteen hundred and ninety-four," approved March third, eighteen hundred and ninety-three, including the unexpended balance of the present appropriation, thirty thousand dollars, to be immediately available; and the President is hereby authorized to appoint two additional members of said Commission, who shall receive the compensation and expenses provided in said act for members of said Commission: *Provided*, That so much of said act as authorizes the employment of a stenographer and a surveyor, or other assistant or agent, is hereby repealed.

[Act of June 10, 1896 (29 Stat. L., 321).]

For salaries and expenses of the commissioners appointed under acts of Congress approved March third, eighteen hundred and ninety-three, and March second, eighteen hundred and ninety-five, to negotiate with the Five Civilized Tribes in the Indian Territory, the sum of forty thousand dollars, to be immediately available; and said Commission is directed to continue the exercise of the authority already conferred upon them by law and endeavor to accomplish the objects heretofore prescribed to them and report from time to time to Congress.

That said Commission is further authorized and directed to proceed at once to hear and determine the application of all persons who may apply to them for citizenship in any of said nations, and after said hearing they shall determine the right of said applicant to be so admitted and enrolled: *Provided, however*, That such application shall be made to such commissioners within three months after the passage of this act. The said Commission shall decide all such applications within ninety days after the same shall be made. That in determining all such applications said Commission shall respect all laws of the several nations or tribes, not inconsistent with the laws of the United States, and all treaties with either of said nations or tribes, and shall give due force and effect to the rolls, usages, and customs of each of said nations or tribes: *And provided further*, That the rolls of citizenship of the several tribes as now existing are hereby confirmed, and any person who shall claim to be entitled to be added to said rolls as a citizen of either of said tribes and whose right thereto has either been denied or not acted upon, or any citizen who may within three months from and after the passage of this act desire such citizenship, may ap-

ply to the legally constituted court or committee designated by the several tribes for such citizenship, and such court or committee shall determine such application within thirty days from the date thereof.

In the performance of such duties said Commission shall have power and authority to administer oaths, to issue process for and compel the attendance of witnesses, and to send for persons or papers, and all depositions and affidavits and other evidence in any form whatsoever heretofore taken where the witnesses giving said testimony are dead or now residing beyond the limits of said Territory, and to use every fair and reasonable means within their reach for the purpose of determining the rights of persons claiming such citizenship, or to protect any of said nations from fraud or wrong, and the rolls so prepared by them shall be hereafter held to be the true and correct rolls of persons entitled to the rights of citizenship in said several tribes: *Provided*, That if the tribe, or any person, be aggrieved with the decision of the tribal authorities or the Commission provided for in this act, it or he may appeal from such decision to the United States district court: *Provided, however*, That the appeal shall be taken within sixty days, and the judgment of the court shall be final.

That the said Commission, after the expiration of six months, shall cause a complete roll of citizenship of each of said nations to be made up from their records, and add thereto the names of citizens whose right may be conferred under this act, and said rolls shall be, and are hereby, made rolls of citizenship of said nations or tribes, subject, however, to the determination of the United States courts, as provided herein.

The Commission is hereby required to file the lists of members as they finally approve them with the Com-

missioner of Indian Affairs, to remain there for use as the final judgment of the duly constituted authorities. And said Commission shall also make a roll of freedmen entitled to citizenship in said tribes, and shall include their names in the lists of members to be filed with the Commissioner of Indian Affairs. And said Commission is further authorized and directed to make a full report to Congress of leases, tribal and individual, with the area, amount, and value of the property leased and the amount received therefor, and by whom and from whom said property is leased, and is further directed to make a full and detailed report as to the excessive holdings of the members of said tribes and others.

It is hereby declared to be the duty of the United States to establish a government in the Indian Territory which will rectify the many inequalities and discriminations now existing in said Territory, and afford needful protection to the lives and property of all citizens and residents thereof.

[Act of June 7, 1897 (30 Stat. L., 83).]

For salaries of the commissioners appointed under acts of Congress approved March third, eighteen hundred and ninety-three, and March second, eighteen hundred and ninety-five, to negotiate with the Five Civilized Tribes in the Indian Territory, twenty-five thousand dollars; for expenses of commissioners and necessary expenses of employes, ten thousand dollars, of which sum so much as may be necessary for expenses of employes for eighteen hundred and ninety-seven, to be immediately available: *Provided*, That two dollars per diem for expenses of a clerk detailed as special disbursing agent from date of original detail by Interior Department, while on duty with the Commission, shall be paid therefrom; for clerical help, including secretary of Commission, five thousand six hundred dollars; for contingent expenses of the Commission, one thousand four hundred dollars; in all, forty-two thousand dollars: *Provided*, That out of the appropriations for salaries and expenses of said commissioners for the fiscal year ending June thirtieth, eighteen hundred and ninety-seven, and prior years, there shall be paid for services heretofore performed, to F. E. Willie, twenty-seven dollars; A. W. Dickey, thirty-nine dollars; W. H. McClendon, thirty-three dollars; Henry Stroup, five hundred dollars; N. L. Steele, one hundred dollars: *And provided further*, The disbursing agent of said Commission may reimburse A. S. McKennon out of said fund fifty dollars heretofore paid by him to W. S. Olive for services. That the Commission appointed to negotiate with the Five Civilized Tribes in the Indian Territory shall examine and report to Congress whether the Mississippi Choctaws under their treaties are not entitled to all the rights of Choctaw citizenship except an interest in the Choctaw annuities: *Provided further*, That on and after

January first, eighteen hundred and ninety-eight, the United States courts in said Territory shall have original and exclusive jurisdiction and authority to try and determine all civil causes in law and equity thereafter instituted and all criminal causes for the punishment of any offense committed after January first, eighteen hundred and ninety-eight, by any person in said Territory, and the United States commissioners in said Territory shall have and exercise the powers and jurisdiction already conferred upon them by existing laws of the United States as respects all persons and property in said Territory; and the laws of the United States and the State of Arkansas in force in the Territory shall apply to all persons therein, irrespective of race, said courts exercising jurisdiction thereof as now conferred upon them in the trial of like causes; and any citizen of any one of said tribes otherwise qualified who can speak and understand the English language may serve as a juror in any of said courts.

That said Commission shall continue to exercise all authority heretofore conferred on it by law to negotiate with the Five Tribes, and any agreement made by it with any of said tribes, when ratified, shall operate to suspend any provisions of this act if in conflict therewith as to said nation: *Provided*, That the words "rolls of citizenship," as used in the act of June tenth, eighteen hundred and ninety-six, making appropriations for current and contingent expenses of the Indian Department and fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, eighteen hundred and ninety-seven, shall be construed to mean the last authenticated rolls of each tribe which have been approved by the council of the nation, and the descendants of those appearing on such rolls, and such additional names and their descendants as have been sub-

sequently added, either by the council of such nation, the duly authorized courts thereof, or the Commission under the act of June tenth, eighteen hundred and ninety-six. And all other names appearing upon such rolls shall be open to inevestigation by such Commission for a period of six months after the passage of this act. And any name appearing on such rolls and not confirmed by the act of June tenth, eighteen hundred and ninety-six, as herein construed, may be stricken therefrom by such Commission where the party affected shall have ten days' previous notice that said Commission will investigate and determine the right of such party to remain upon such roll as a citizen of such nation: *Provided also*, That anyone whose name shall be stricken from the roll by such Commission shall have the right of appeal, as provided in the act of June tenth, eighteen hundred and ninety-six.

That on and after January first, eighteen hundred and ninety-eight, all acts, ordinances, and resolutions of the council of either of the aforesaid Five Tribes passed shall be certified immediately upon their passage to the President of the United States and shall not take effect if disapproved by him, or until thirty days after their passage: *Provided*, That this act shall not apply to resolutions for adjournment, or any acts, or resolutions, or ordinances in relation to negotiations with commissioners heretofore appointed to treat with said tribes.

[Act of June 28, 1898 (30 Stat. L., 495).]
(Curtis Act.)

AN ACT For the protection of the people of the Indian Territory and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all criminal prosecutions in the Indian Territory against officials for embezzlement, bribery, and embracery, the word "officer," when the same appears in the criminal laws heretofore extended over and put in force in said Territory, shall include all officers of the several tribes or nations of Indians in said Territory.

SEC. 2. That when in the progress of any civil suit, either in law or equity, pending in the United States court, in any district in said Territory, it shall appear to the court that the property of any tribe is in any way affected by the issues being heard, said court is hereby authorized and required to make said tribe a party to said suit by service upon the chief or governor of the tribe, and the suit shall thereafter be conducted and determined as if said tribe had been an original party to said action.

SEC. 3. That said courts are hereby given jurisdiction in their respective districts to try cases against those who may claim to hold as members of a tribe and whose membership is denied by the tribe, but who continue to hold said lands and tenements notwithstanding the objection of the tribe; and if it be found upon trial that the same are held unlawfully against the tribe by those claiming to be members thereof, and the membership and right are disallowed by the Commission to the Five Tribes, or the United States court, and the

judgment has become final, then said court shall cause the parties charged with unlawfully holding said possessions to be removed from the same and cause the lands and tenements to be restored to the person or persons or nation or tribe of Indians entitled to the possession of the same: *Provided always*, That any person being a noncitizen in possession of lands, holding the possession thereof under an agreement, lease, or improvement contract with either of said nations or tribes, or any citizen thereof, executed prior to January first, eighteen hundred and ninety-eight, may, as to lands not exceeding in amount one hundred and sixty acres, in defense of any action for the possession of said lands show that he is and has been in peaceable possession of such lands, and that he has while in such possession made lasting and valuable improvements thereon, and that he has not enjoyed the possession thereof a sufficient length of time to compensate him for such improvements. Thereupon the court or jury trying said cause shall determine the fair and reasonable value of such improvements and the fair and reasonable rental value of such lands for the time the same shall have been occupied by such person, and if the improvements exceed in value the amount of rents with which such person should be charged, the court, in its judgment, shall specify such time as will, in the opinion of the court, compensate such person for the balance due, and award him possession for such time unless the amount be paid by claimant within such reasonable time as the court shall specify. If the finding be that the amount of rents exceed the value of the improvements, judgment shall be rendered against the defendant for such sum, for which execution may issue.

SEC. 4. That all persons who have heretofore made improvements on lands belonging to any one of the said

tribes of Indians, claiming rights of citizenship, whose claims have been decided adversely, under the act of Congress approved June tenth, eighteen hundred and ninety-six, shall have possession thereof until and including December thirty-first, eighteen hundred and ninety-eight, and may, prior to that time, sell or dispose of the same to any member of the tribe owning the land who desires to take the same in his allotment: *Provided*, That this section shall not apply to improvements which have been appraised and paid for, or payment tendered by the Cherokee Nation under the agreement with the United States approved by Congress March third, eighteen hundred and ninety-three.

SEC. 5. That before any action by any tribe or person shall be commenced under section three of this act it shall be the duty of the party bringing the same to notify the adverse party to leave the premises for the possession of which the action is about to be brought, which notice shall be served at least thirty days before commencing the action by leaving a written copy with the defendant, or, if he can not be found, by leaving the same at his last known place of residence or business with any person occupying the premises over the age of twelve years, or, if his residence or business address can not be ascertained, by leaving the same with any person over the age of twelve years upon the premises sought to be recovered and described in said notice; and if there be no person with whom said notice can be left, then by posting same on the premises.

SEC. 6. That the summons shall not issue in such action until the chief or governor of the tribe, or person or persons bringing suit in his own behalf, shall have filed a sworn complaint, on behalf of the tribe or himself, with the court, which shall, as near as practi-

cable, describe the premises so detained, and shall set forth a detention without the consent of the person bringing said suit or the tribe, by one whose membership is denied by it: *Provided*, That if the chief or governor refuse or fail to bring suit in behalf of the tribe, then any member of the tribe may make complaint and bring said suit.

SEC. 7. That the court in granting a continuance of any case, particularly under section three, may, in its discretion, require the party applying therefor to give an undertaking to the adverse party, with good and sufficient securities, to be approved by the judge of the court, conditioned for the payment of all damages and costs and defraying the rent which may accrue if judgment be rendered against him.

SEC. 8. That when a judgment for restitution shall be entered by the court, the clerk shall, at the request of the plaintiff or his attorney, issue a writ of execution thereon, which shall commend the proper officer of the court to cause the defendant or defendants to be forthwith removed and ejected from the premises and the plaintiff given complete and undisturbed possession of the same. The writ shall also command the said officer to levy upon the property of the defendant or defendants subject to execution, and also collect therefrom the costs of the action and all accruing costs in the service of the writ. Said writ shall be executed within thirty days.

SEC. 9. That the jurisdiction of the court and municipal authority of the city of Fort Smith for police purposes in the State of Arkansas is hereby extended over all that strip of land in the Indian Territory lying and being situate between the corporate limits of the said city of Fort Smith and the Arkansas and Poteau rivers, and extending up the said Poteau river to the

mouth of Mill Creek; and all the laws and ordinances for the preservation of the peace and health of said city, as far as the same are applicable, are hereby put in force therein: *Provided*, That no charge or tax shall ever be made or levied by said city against said land or the tribe or nation to whom it belongs.

SEC. 10. That all actions for restitution of possession of real property under this act must be commenced by the service of a summons within two years after the passage of this act, where the wrongful detention or possession began prior to the date of its passage; and all actions which shall be commenced hereafter, based upon wrongful detention or possession committed since the passage of this act must be commenced within two years after the cause of action accrued. And nothing in this act shall take away the right to maintain an action for unlawful and forcible entry and detainer given by the act of Congress passed May second, eighteen hundred and ninety (twenty-sixth United States Statutes, page ninety-five).

SEC. 11. That when the roll of citizenship of any one of said nations or tribes is fully completed as provided by law, and the survey of the lands of said nation or tribe is also completed, the Commission heretofore appointed under acts of Congress, and known as the "Dawes Commission," shall proceed to allot the exclusive use and occupancy of the surface of all the lands of said nation or tribe susceptible of allotment among the citizens thereof, as shown by said roll, giving to each, so far as possible, his fair and equal share thereof, considering the nature and fertility of the soil, location, and value of same; but all oil, coal, asphalt, and mineral deposits in the lands of any tribe are reserved to such tribe, and no allotment of such lands shall carry

the title to such oil, coal, asphalt, or mineral deposits; and all town sites shall also be reserved to the several tribes, and shall be set apart by the Commission heretofore mentioned as incapable of allotment. There shall also be reserved from allotment a sufficient amount of lands now occupied by churches, schools, parsonages, charitable institutions, and other public buildings for their present actual and necessary use, and no more, not to exceed five acres for each school and one acre for each church and each parsonage, and for such new schools as may be needed; also sufficient land for burial grounds where necessary. When such allotment of the lands of any tribe has been by them completed, said Commission shall make full report thereof to the Secretary of the Interior for his approval: *Provided*, That nothing herein contained shall in any way affect any vested legal rights which may have been heretofore granted by act of Congress, nor be so construed as to confer any additional rights upon any parties claiming under any such act of Congress: *Provided further*, That whenever it shall appear that any member of a tribe is in possession of lands, his allotment may be made out of the lands in his possession, including his home if the holder so desires: *Provided further*, That if the person to whom an allotment shall have been made shall be declared, upon appeal as herein provided for, by any of the courts of the United States in or for the aforesaid Territory, to have been illegally accorded rights of citizenship, and for that or any other reason declared to be not entitled to any allotment, he shall be ousted and ejected from said lands; that all persons known as intruders who have been paid for their improvements under existing laws and have not surrendered possession thereof who may be found under the provisions of this act to be entitled to citizenship, shall, within ninety days thereafter, refund the amount so paid them, with six per centum

interest, to the tribe entitled thereto; and upon their failure so to do said amount shall become a lien upon all improvements owned by such person in such Territory, and may be enforced by such tribe; and unless such person makes such restitution no allotments shall be made to him: *Provided further*, That the lands allotted shall be nontransferable until after full title is acquired and shall be liable for no obligations contracted prior thereto by the allottee, and shall be nontaxable while so held: *Provided further*, That all towns and cities heretofore incorporated or incorporated under the provisions of this act are hereby authorized to secure, by condemnation or otherwise, all the lands actually necessary for public improvements, regardless of tribal lines; and when the same can not be secured otherwise than by condemnation, then the same may be acquired as provided in sections nine hundred and seven and nine hundred and twelve, inclusive, of Mansfield's Digest of the Statutes of Arkansas.

SEC. 12. That when report of allotments of lands of any tribe shall be made to the Secretary of the Interior, as hereinbefore provided, he shall make a record thereof, and when he shall confirm such allotments the allottees shall remain in peaceable and undisturbed possession thereof, subject to the provisions of this act.

SEC. 13. That the Secretary of the Interior is hereby authorized and directed from time to time to provide rules and regulations in regard to the leasing of oil, coal, asphalt, and other minerals in said Territory, and all such leases shall be made by the Secretary of the Interior; and any lease for any such minerals otherwise made shall be absolutely void. No lease shall be made or renewed for a longer period than fifteen years, nor cover the mineral in more than six hundred and forty acres of land, which shall conform as nearly as

possible to the surveys. Lessees shall pay on each oil, coal, asphalt, or other mineral claim at the rate of one hundred dollars per annum, in advance, for the first and second years; two hundred dollars per annum, in advance, for the third and fourth years, and five hundred dollars, in advance, for each succeeding year thereafter, as advanced royalty on the mine or claim on which they are made. All such payments shall be a credit on royalty when each said mine is developed and operated and its production is in excess of such guaranteed annual advanced payments; and all lessees must pay said annual advanced payments on each claim, whether developed or undeveloped; and should any lessee neglect or refuse to pay such advanced annual royalty for the period of sixty days after the same becomes due and payable on any lease, the lease on which default is made shall become null and void, and the royalties paid in advance shall then become and be the money and property of the tribe. Where any oil, coal, asphalt, or other mineral is hereafter opened on land allotted, sold, or reserved, the value of the use of the necessary surface for prospecting or mining, and the damage done to the other land and improvements, shall be ascertained under the direction of the Secretary of the Interior and paid to the allottee or owner of the land, by the lessee or party operating the same, before operations begin: *Provided*, That nothing herein contained shall impair the rights of any holder or owner of a leasehold interest in any oil, coal rights, asphalt, or mineral which have been assented to by act of Congress, but all such interest shall continue unimpaired hereby, and shall be assured to such holders or owners by leases from the Secretary of the Interior for the term not exceeding fifteen years, but subject to payment of advance royalties as herein provided, when such leases are not operated, to the rate of royalty on coal mined, and the rules and regulations

to be prescribed by the Secretary of the Interior, and preference shall be given to such parties in renewals of such leases: *And provided further*, That when, under the customs and laws heretofore existing and prevailing in the Indian Territory, leases have been made of different groups or parcels of oil, coal, asphalt, or other mineral deposits, and possession has been taken thereunder and improvements made for the development of such oil, coal, asphalt, or other mineral deposits, by lessees or their assigns, which have resulted in the production of oil, coal, asphalt, or other mineral in commercial quantities by such lessees or their assigns, then such parties in possession shall be given preference in the making of new leases, in compliance with the directions of the Secretary of the Interior; and in making new leases due consideration shall be made for the improvements of such lessees, and in all cases of the leasing or renewal of leases of oil, coal, asphalt, and other mineral deposits preference shall be given to parties in possession who have made improvements. The rate of royalty to be paid by all lessees shall be fixed by the Secretary of the Interior.

SEC. 14. That the inhabitants of any city or town in said Territory having two hundred or more residents therein may proceed, by petition to the United States court in the district in which such city or town is located, to have the same incorporated as provided in chapter twenty-nine of Mansfield's Digest of the Statutes of Arkansas, if not already incorporated thereunder; and the clerk of said court shall record all papers and perform all the acts required of the recorder of the county, or the clerk of the county court, or the secretary of state, necessary for the incorporation of any city or town, as provided in Mansfield's Digest, and such city or town government, when so authorized and organized,

shall possess all the powers and exercise all the rights of similar municipalities in said State of Arkansas. All male inhabitants of such cities and towns over the age of twenty-one years, who are citizens of the United States or of either of said tribes, who have resided therein more than six months next before any election held under this act, shall be qualified voters at such election. That mayors of such cities and towns, in addition to their other powers, shall have the same jurisdiction in all civil and criminal cases arising within the corporate limits of such cities and towns as, and coextensive with, United States commissioners in the Indian Territory, and may charge, collect, and retain the same fees as such commissioners now collect and account for to the United States; and the marshal or other executive officer of such city or town may execute all processes issued in the exercise of the jurisdiction hereby conferred, and charge and collect the same fees for similar services as are allowed to constables under the laws now in force in said Territory.

All elections shall be conducted under the provisions of chapter fifty-six of said digest, entitled "Elections," so far as the same may be applicable; and all inhabitants of such cities and towns, without regard to race, shall be subject to all laws and ordinances of such city or town governments, and shall have equal rights, privileges, and protection therein. Such city or town governments shall in no case have any authority to impose upon or levy any tax against any lands in said cities or towns until after title is secured from the tribe; but all other property, including all improvements on town lots, which for the purposes of this act shall be deemed and considered personal property, together with all occupations and privileges, shall be subjet to taxation. And the councils of such cities and towns, for the support of

the same and for school and other public purposes, may provide by ordinance for the assessment, levy, and collection annually of a tax upon such property, not to exceed in the aggregate two per centum of the assessed value thereof, in manner provided in chapter one hundred and twenty-nine of said digest, entitled "Revenue," and for such purposes may also impose a tax upon occupations and privileges.

Such councils may also establish and maintain free schools in such cities and towns, under the provisions of sections sixty-two hundred and fifty-eight to sixty-two hundred and seventy-six, inclusive, of said digest, and may exercise all the powers conferred upon special school districts in cities and towns in the State of Arkansas by the laws of said State when the same are not in conflict with the provisions of this act.

For the purposes of this section all the laws of said State of Arkansas herein referred to, so far as applicable, are hereby put in force in said Territory; and the United States court therein shall have jurisdiction to enforce the same, and to punish any violation thereof, and the city or town councils shall pass such ordinances as may be necessary for the purpose of making the laws extended over them applicable to them and for carrying the same into effect: *Provided*, That nothing in this act, or in the laws of the State of Arkansas, shall authorize or permit the sale, or exposure for sale, of any intoxicating liquor in said Territory, or the introduction thereof into said Territory; and it shall be the duty of the district attorneys in said Territory and the officers of such municipalities to prosecute all violators of the laws of the United States relating to the introduction of intoxicating liquors into said Territory, or to their sale, or exposure for sale, therein: *Provided further*,

That owners and holders of leases or improvements in any city or town shall be privileged to transfer the same.

SEC. 15. That there shall be a commission in each town for each one of the Chickasaw, Choctaw, Creek, and Cherokee tribes, to consist of one member to be appointed by the executive of the tribe, who shall not be interested in town property, other than his home; one person to be appointed by the Secretary of the Interior, and one member to be selected by the town. And if the executive of the tribe or town fail to select members as aforesaid, they may be selected and appointed by the Secretary of the Interior.

Said commissions shall cause to be surveyed and laid out town sites where towns with a present population of two hundred or more are located, conforming to the existing survey, so far as may be, with proper and necessary streets, alleys, and public grounds, including parks and cemeteries, giving to each town such territory as may be required for its present needs and reasonable prospective growth; and shall prepare correct plats thereof, and file one with the Secretary of the Interior, one with the clerk of the United States court, one with the authorities of the tribe, and one with the town authorities. And all town lots shall be appraised by said commission at their true value, excluding improvements; and separate appraisements shall be made of all improvements thereon; and no such appraisement shall be effective until approved by the Secretary of the Interior, and in case of disagreement by the members of such commission as to the value of any lot the Secretary may fix the value thereof.

The owner of the improvements upon any town lot, other than fencing, tillage, or temporary buildings, may deposit in the United States treasury, St. Louis, Missouri, one-half of such appraised value; ten per centum

within two months and fifteen per centum more within six months after notice of appraisement, and the remainder in three equal annual installments thereafter, depositing with the Secretary of the Interior one receipt for each payment, and one with the authorities of the tribe, and such deposit shall be deemed a tender to the tribe of the purchase money for such lot.

If the owner of such improvements on any lot fails to make deposit of the purchase money as aforesaid, then such lot may be sold in the manner herein provided for the sale of unimproved lots; and when the purchaser thereof has complied with the requirements herein for the purchase of improved lots he may, by petition, apply to the United States court within whose jurisdiction the town is located, for condemnation and appraisement of such improvements, and petitioner shall, after judgment, deposit the value so fixed with the clerk of the court; and thereupon the defendant shall be required to accept the same in full payment for his improvements or remove same from the lot within such time as may be fixed by the court.

All town lots not improved as aforesaid shall belong to the tribe, and shall be in like manner appraised, and, after approval by the Secretary of the Interior, and due notice, sold to the highest bidder at public auction by said commission, but not for less than their appraised value, unless ordered by the Secretary of the Interior; and purchasers may in like manner make deposits of the purchase money with like effect, as in case of improved lots.

The inhabitants of any town may, within one year after the completion of the survey thereof, make such deposit of ten dollars per acre for parks, cemeteries, and other public grounds laid out by said commission with

like effect as for improved lots; and such parks and public grounds shall not be used for any purpose until such deposits are made.

The person authorized by the tribe or tribes may execute or deliver to any such purchaser, without expense to him, a deed conveying to him the title to such lands or town lots; and thereafter the purchase money shall become the property of the tribe;and all such moneys shall, when titles to all the lots in the towns belonging to any tribe have been thus perfected, be paid per capita to the members of the tribe: *Provided, however*, That in those townsites designated and laid out under the provisions of this act where coal leases are now being operated and coal is being mined there shall be reserved from appraisement and sale all lots occupied by houses of miners actually engaged in mining, and only while they are so engaged, and in addition thereto a sufficient amount of land, to be determined by the appraisers, to furnish homes for the men actually engaged in working for the lessees operating said mines and a sufficient amount for all buildings and machinery for mining purposes: *And provided further*, That when the lessees shall cease to operate said mines, then, and in that event, the lots of land so reserved shall be disposed of as provided for in this act.

SEC. 16. That it shall be unlawful for any person, after the passage of this act, except as hereinafter provided, to claim, demand, or receive, for his own use or for the use of anyone else, any royalty on oil, coal, asphalt, or other mineral, or on any timber, or lumber, or any other kind of property whatsoever, or any rents on any lands or property belonging to any one of said tribes or nations in said Territory, or for anyone to pay to any individual any such royalty or rents or any consideration therefor whatsoever; and all royalties and

rents hereafter payable to the tribe shall be paid, under such rules and regulations as may be prescribed by the Secretary of the Interior, into the Treasury of the United States to the credit of the tribe to which they belong: *Provided*, That where any citizen shall be in possession of only such amount of agricultural or grazing lands as would be his just and reasonable share of the lands of his nation or tribe and that to which his wife and minor children are entitled, he may continue to use the same or receive the rents thereon until allotment has been made to him: *Provided further*, That nothing herein contained shall impair the rights of any member of a tribe to dispose of any timber contained on his, her, or their allotment.

SEC. 17. That it shall be unlawful for any citizen of any one of said tribes to inclose or in any manner, by himself or through another, directly or indirectly, to hold possession of any greater amount of lands or other property belonging to any such nation or tribe than that which would be his approximate share of the lands belonging to such nation or tribe and that of his wife and his minor children as per allotment herein provided; and any person found in such possession of lands or other property in excess of his share and that of his family, as aforesaid, or having the same in any manner inclosed, at the expiration of nine months after the passage of this act, shall be deemed guilty of a misdemeanor.

SEC. 18. That any person convicted of violating any of the provisions of sections sixteen and seventeen of this act shall be deemed guilty of a misdemeanor and punished by a fine or not less than one hundred dollars, and shall stand committed until such fine and costs are paid (such commitment not to exceed one day for every two dollars of said fine and costs), and shall forfeit pos-

session of any property in question, and each day on which such offense is committed or continues to exist shall be deemed a separate offense. And the United States district attorneys in said Territory are required to see that the provisions of said sections are strictly enforced, and they shall at once proceed to dispossess all persons of such excessive holding of lands and to prosecute them for so unlawfully holding the same.

SEC. 19. That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof for disbursement, but payments of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him; and per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation.

SEC. 20. That the commission hereinbefore named shall have authority to employ, with the approval of the Secretary of the Interior, all assistance necessary for the prompt and efficient performance of all duties herein imposed, including competent surveyors to make allotments, and to do any other needed work, and the Secretary of the Interior may detail competent clerks to aid them in the performance of their duties.

SEC. 21. That in making rolls of citizenship of the several tribes, as required by law, the Commission to the Five Civilized Tribes is authorized and directed to take the roll of Cherokee citizens of eighteen hundred and eighty (not including freedmen) as the only roll intended to be confirmed by this and preceding acts of Congress, and to enroll all persons now living whose names are found on said roll, and all descendants born

since the date of said roll to persons whose names are found thereon; and all persons who have been enrolled by the tribal authorities who have heretofore made permanent settlement in the Cherokee Nation whose parents, by reason of their Cherokee blood, have been lawfully admitted to citizenship by the tribal authorities, and who were minors when their parents were so admitted; and they shall investigate the right of all other persons whose names are found on any other rolls and omit all such as may have been placed thereon by fraud or without authority of law, enrolling only such as may have lawful right thereto, and their descendants born since such rolls were made, with such intermarried white persons as may be entitled to citizenship under Cherokee laws.

It shall make a roll of Cherokee freedmen in strict compliance with the decree of the Court of Claims rendered the third day of February, eighteen hundred and ninety-six.

Said Commission is authorized and directed to make correct rolls of the citizens by blood of all the other tribes, eliminating from the tribal rolls such names as may have been placed thereon by fraud or without authority of law, enrolling such only as may have lawful right thereto, and their descendants born since such rolls were made, with such intermarried white persons as may be entitled to Choctaw and Chickasaw citizenship under the treaties and the laws of said tribes.

Said Commission shall have authority to determine the identity of Choctaw Indians claiming rights in the Choctaw lands under article fourteen of the treaty between the United States and the Choctaw Nation concluded September twenty-seventh, eighteen hundred and thirty, and to that end may administer oaths, examine

witnesses, and perform all other acts necessary thereto and make report to the Secretary of the Interior.

The roll of Creek freedmen made by J. W. Dunn, under authority of the United States, prior to March fourteenth, eighteen hundred and sixty-seven, is hereby confirmed, and said Commission is directed to enroll all persons now living whose names are found on said rolls, and all descendants born since the date of said roll to persons whose names are found thereon, with such other persons of African descent as may have been rightfully admitted by the lawful authorities of the Creek Nation.

It shall make a correct roll of all Choctaw freedmen entitled to citizenship under the treaties and laws of the Choctaw Nation, and all their descendants born to them since the date of the treaty.

It shall make a correct roll of Chickasaw freedmen entitled to any rights or benefits under the treaty made in eighteen hundred and sixty-six between the United States and the Choctaw and Chickasaw tribes and their descendants born to them since the date of said treaty, and forty acres of land, including their present residences and improvements, shall be allotted to each, to be selected, held, and used by them until their rights under said treaty shall be determined in such manner as shall be hereafter provided by Congress.

The several tribes may, by agreement, determine the right of persons who for any reason may claim citizenship in two or more tribes, and to allotment of lands and distribution of moneys belonging to each tribe; but if no such agreement be made, then such claimant shall be entitled to such rights in one tribe only, and may elect in which tribe he will take such right; but if he fail or refuse to make such selection in due time, he shall be enrolled in the tribe with whom he has resided,

and there be given such allotment and distributions, and not elsewhere.

No person shall be enrolled who has not heretofore removed to and in good faith settled in the nation in which he claims citizenship: *Provided, however*, That nothing contained in this act shall be so construed as to militate against any rights or privileges which the Mississippi Choctaws may have under the laws of or the treaties with the United States.

Said Commission shall make such rolls descriptive of the persons thereon, so that they may be thereby identified, and it is authorized to take a census of each of said tribes, or to adopt any other means by them deemed necessary to enable them to make such rolls. They shall have access to all rolls and records of the several tribes, and the United States court in Indian Territory shall have jurisdiction to compel the officers of the tribal governments and custodians of such rolls and records to deliver same to said Commission, and on their refusal or failure to do so to punish them as for contempt; as also to require all citizens of said tribes, and persons who should be so enrolled, to appear before said Commission for enrollment, at such times and places as may be fixed by said Commission, and to enforce obedience of all others concerned, so far as the same may be necessary, to enable said Commission to make rolls as herein required, and to punish anyone who may in any manner or by any means obstruct said work.

The rolls so made, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon, with their descendants thereafter born to them, with such persons as may intermarry according to tribal laws, shall alone constitute the several tribes which they represent.

The members of said Commission shall, in performing all duties required of them by law, have authority to administer oaths, examine witnesses, and send for persons and papers; and any person who shall wilfully and knowingly make any false affidavit or oath to any material fact or matter before any member of said Commission, or before any other officer authorized to administer oaths, to any affidavit or other paper to be filed or oath taken before said Commission, shall be deemed guilty of perjury, and on conviction thereof shall be punished as for such offense.

SEC. 22. That where members of one tribe, under intercourse laws, usages, or customs, have made homes within the limits and on the lands of another tribe they may retain and take allotment, embracing same under such agreement as may be made between such tribes respecting such settlers: but if no such agreement be made, the improvements so made shall be appraised, and the value thereof, including all damages incurred by such settler incident to enforced removal, shall be paid to him immediately upon removal, out of any funds belonging to the tribe, or such settler, if he so desire, may make private sale of his improvements to any citizen of the tribe owning the lands: *Provided*, That he shall not be paid for improvements made on lands in excess of that to which he, his wife, and minor children are entitled to under this act.

SEC. 23. That all leases of agricultural or grazing land belonging to any tribe made after the first day of January, eighteen hundred and ninety-eight, by the tribe or any member thereof, shall be absolutely void, and all such grazing leases made prior to said date shall terminate on the first day of April, eighteen hundred and ninety-nine, and all such agricultural leases shall terminate on January first, nineteen hundred: but this

shall not prevent individuals from leasing their allotments when made to them as provided in this act, nor from occupying or renting their proportionate shares of the tribal lands until the allotments herein provided for are made.

SEC. 24. That all moneys paid into the United States treasury at Saint Louis, Missouri, under provisions of this act shall be placed to the credit of the tribe to which they belong; and the assistant United States treasurer shall give triplicate receipts therefor to the depositor.

SEC. 25. That before any allotment shall be made of lands in the Cherokee Nation, there shall be segregated therefrom by the Commission heretofore mentioned, in separate allotments or otherwise, the one hundred and fifty-seven thousand six hundred acres purchased by the Delaware tribe of Indians from the Cherokee Nation under agreement of April eighth, eighteen hundred and sixty-seven, subject to the judicial determination of the rights of said descendants and the Cherokee Nation under said agreement. That the Delaware Indians residing in the Cherokee Nation are hereby authorized and empowered to bring suit in the Court of Claims of the United States, within sixty days after the passage of this act, against the Cherokee Nation, for the purpose of determining the rights of said Delaware Indians in and to the lands and funds of said nation under their contract and agreement with the Cherokee Nation dated April 8th, eighteen hundred and sixty-seven; or the Cherokee Nation may bring a like suit against said Delaware Indians; and jurisdiction is conferred on said court to adjudicate and fully determine the same, with right of appeal to either party to the Supreme Court of the United States.

SEC. 26. That on and after the passage of this act the laws of the various tribes or nations of Indians shall

not be enforced at law or in equity by the courts of the United States in the Indian Territory.

SEC. 27. That the Secretary of the Interior is authorized to locate one Indian inspector in Indian Territory, who may, under his authority and direction, perform any duties required of the Secretary of the Interior by law relating to affairs therein.

SEC. 28. That on the first day of July, eighteen hundred and ninety-eight, all tribal courts in Indian Territory shall be abolished, and no officer of said courts shall thereafter have any authority whatever to do or perform any act theretofore authorized by any law in connection with said courts, or to receive any pay for same; and all civil and criminal causes then pending in any such court shall be transferred to the United States court in said Territory by filing with the clerk of the court the original papers in the suit: *Provided*, That this section shall not be in force as to the Chickasaw, Choctaw, and Creek tribes or nations until the first day of October, eighteen hundred and ninety-eight.

SEC. 29. That the agreement made by the Commission to the Five Civilized Tribes with commissions representing the Choctaw and Chickasaw tribes of Indians on the twenty-third day of April, eighteen hundred and ninety-seven, as herein amended, is hereby ratified and confirmed, and the same shall be of full force and effect if ratified before the first day of December, eighteen hundred and ninety-eight, by a majority of the whole number of votes cast by the members of said tribes at an election held for that purpose; and the executives of said tribes are hereby authorized and directed to make public proclamation that said agreement shall be voted on at the next general election, or at any special election to be called by such executives for the purpose of

voting on said agreement; and at the election held for such purpose all male members of each of said tribes qualified to vote under his tribal laws shall have the right to vote at the election precinct most convenient to his residence, whether the same be within the bounds of his tribe or not: *Provided*, That no person whose right to citizenship in either of said tribes or nations is now contested in original or appellate proceedings before any United States court shall be permitted to vote at said election: *Provided further*, That the votes cast in both said tribes or nations shall be forthwith returned duly certified by the precinct officers to the national secretaries of said tribes or nations, and shall be presented by said national secretaries to a board of commissioners consisting of the principal chief and national secretary of the Choctaw Nation, the governor and national secretary of the Chickasaw Nation, and a member of the Commission to the Five Civilized Tribes, to be designated by the chairman of said Commission; and said board shall meet without delay at Atoka, in the Indian Territory, and canvass and count said votes and make proclamation of the result; and if said agreement as amended be so ratified, the provisions of this act shall then only apply to said tribes where the same do not conflict with the provisions of said agreement; but the provisions of said agreement, if so ratified, shall not in any manner affect the provisions of section fourteen of this act, which said amended agreement is as follows:

This agreement, by and between the Government of the United States, of the first part, entered into in its behalf by the Commission to the Five Civilized Tribes, Henry L. Dawes, Frank C. Armstronog, Archibald S. McKennon, Thomas B. Cabaniss, and Alexander B. Montgomery, duly appointed and authorized thereunto, and the governments of the Choctaw and Chickasaw

tribes or nations of Indians in the Indian Territory, respectively, of the second part, entered into in behalf of such Choctaw and Chickasaw governments, duly appointed and authorized thereunto, viz: Green McCurtain, J. S. Standley, N. B. Ainsworth, Ben Hampton, Wesley Anderson, Amos Henry, D. C. Garland, and A. S. Williams, in behalf of the Choctaw Tribe or Nation, and R. M. Harris, I. O. Lewis, Holmes Colbert, P. S. Mosely, M. V. Cheadle, R. L. Murray, William Perry, A. H. Colbert, and R. L. Boyd, in behalf of the Chickasaw Tribe or Nation.

ALLOTMENT OF LANDS.

Witnesseth, That in consideration of the mutual undertakings, herein contained, it is agreed as follows:

That all the lands within the Indian Territory belonging to the Choctaw and Chickasaw Indians shall be allotted to the members of said tribes so as to give to each member of these tribes so far as possible a fair and equal share thereof, considering the character and fertility of the soil and the location and value of the lands.

That all the lands set apart for town sites, and the strip of land lying between the city of Fort Smith, Arkansas, and the Arkansas and Poteau rivers, extending up said river to the mouth of Mill Creek; and six hundred and forty acres each, to include the buildings now occupied by the Jones Academy, Tushkahoma Female Seminary, Wheelock Orphan Seminary, and Armstrong Orphan Academy, and ten acres for the capitol building of the Choctaw Nation; one hundred and sixty acres each, immediately contiguous to and including the buildings known as Bloomfield Academy, Lebanon Orphan Home, Harley Institute, Rock Academy, and Collins Institute, and five acres for the capitol building in the Chickasaw Nation, and the use of one acre of land for

each church house now erected outside of the towns, and eighty acres of land each for J. S. Murrow, H. R. Schermerhorn, and the widow of R. S. Bell, who have been laboring as missionaries in the Choctaw and Chickasaw Nations since the year eighteen hundred and sixty-six, with the same conditions and limitations as apply to lands allotted to the members of the Choctaw and Chickasaw nations, and to be located on lands not occupied by a Choctaw or a Chickasaw, and a reasonable amount of land, to be determined by the town-site commission, to include all court-houses and jails and other public buildings not hereinbefore provided for, shall be exempted from division. And all coal and asphalt in or under the lands allotted and reserved from allotment shall be reserved for the sole use of the members of the Choctaw and Chickasaw tribes, exclusive of freedmen: *Provided*, That where any coal or asphalt is hereafter opened on land allotted, sold, or reserved, the value of the use of the necessary surface for prospecting or mining, and the damage done to the other lands and improvements, shall be ascertained under the direction of the Secretary of the Interior and paid to the alottee or owner of the land by the lessee or party operating the same, before operations begin. That in order to such equal division, the lands of the Choctaws and Chickasaws shall be graded and appraised so as to give to each member, so far as possible, an equal value of the land: *Provided further*, That the Commission to the Five Civilized Tribes shall make a correct roll of Chickasaw freedmen entitled to any rights or benefits under the treaty made in eighteen hundred and sixty-six between the United States and the Choctaw and Chickasaw tribes and their descendants born to them since the date of said treaty, and forty acres of land, including their present residences and improvements, shall be allotted to each, to be selected, held, and used by them un-

til their rights under said treaty shall be determined, in such manner as shall hereafter be provided by act of Congress.

That the lands allotted to the Choctaw and Chickasaw freedmen are to be deducted from the portion to be allotted under this agreement to the members of the Choctaw and Chickasaw tribes so as to reduce the allotment to the Choctaws and Chickasaws by the value of the same.

That the said Choctaw and Chickasaw freedmen who may be entitled to allotments of forty acres each shall be entitled each to land equal in value to forty acres of the average land of the two nations.

That in the appraisement of the lands to be allotted the Choctaw and Chickasaw tribes shall each have a representative, to be appointed by their respective executives, to co-operate with the Commission to the Five Civilized Tribes, or anyone making appraisements under the direction of the Secretary of the Interior in grading and appraising the lands preparatory to allotment. And the land shall be valued in the appraisement as if in its original condition, excluding the improvements thereon.

That the appraisement and allotment shall be made under the direction of the Secretary of the Interior, and shall begin as soon as the progress of the surveys, now being made by the United States Government, will admit.

That each member of the Choctaw and Chickasaw tribes, including Choctaw and Chickasaw freedmen, shall, where it is possible, have the right to take his allotment on land the improvements on which belong to him, and such improvements shall not be estimated in

the value of his allotment. In the case of minor children, allotments shall be selected for them by their father, mother, guardian, or the administrator having charge of their estate, preference being given in the order named, and shall not be sold during his (or her) minority. Allotments shall be selected for prisoners, convicts, and incompetents by some suitable person akin to them, and due care taken that all persons entitled thereto have allotments made to them.

All the lands allotted shall be nontaxable while the title remains in the original allottee, but not to exceed twenty-one years from date of patent, and each allottee shall select from his allotment a homestead on one hundred and sixty acres, for which he shall have a separate patent, and which shall be inalienable for twenty-one years from date of patent. This provision shall also apply to the Choctaw and Chickasaw freedman to the extent of his allotment. Selections for homesteads for minors to be made as provided herein in case of allotment, and the remainder of the lands allotted to said members shall be alienable for a price to be actually paid, and to include no former indebtedness or obligation—one-fourth of said remainder in one year, one-fourth in three years, and the balance of said alienable lands in five years from the date of the patent.

That all contracts looking to the sale or incumbrance in any way of the land of an allottee, except the sale hereinbefore provided, shall be null and void. No allottee shall lease his allotment, or any portion thereof, for a longer period than five years, and then without the privilege of renewal. Every lease which is not evidenced by writing, setting out specifically the terms thereof, or which is not recorded in the clerk's office of the United States court for the district in which the land is located, within three months after the date of

its execution, shall be void, and the purchaser or lessee shall acquire no rights whatever by an entry or holding thereunder, and no such lease or any sale shall be valid as against the allottee unless providing to him a reasonable compensation for the lands sold or leased.

That all controversies arising between the members of said tribes as to their right to have certain lands allotted to them shall be settled by the commission making the allotments.

That the United States shall put each allottee in possession of his allotment and remove all persons therefrom objectionable to the allottee.

That the United States shall survey and definitely mark and locate the ninety-eighth (98th) meridian of west longitude between Red and Canadian rivers before allotment of the lands herein provided for shall begin.

MEMBERS' TITLES TO LANDS.

That, as soon as practicable after the completion of said allotments, the principal chief of the Choctaw Nation and the governor of the Chickasaw Nation shall jointly execute, under their hands and the seals of the respective nations, and deliver to each of the said allottees patents conveying to him all the right, title, and interest of the Choctaws and Chickasaws in and to the land which shall have been allotted to him in conformity with the requirements of this agreement, excepting all coal and asphalt in or under said land. Said patents shall be framed in accordance with the provisions of this agreement and shall embrace the land allotted to such patentee and no other land, and the acceptance of his patents by such allottee shall be operative as an assent on his part to the allotment and conveyance of all the lands of the Choctaws and Chicka-

saws in accordance with the provisions of this agreement, and as a relinquishment of all his right, title, and interest in and to any and all parts thereof, except the land embraced in said patents, except also his interest in the proceeds of all lands, coal, and asphalt herein excepted from allotment.

That the United States shall provide by law for proper record of land titles in the territory occupied by the Choctaw and Chickasaw tribes.

RAILROADS.

The rights of way for railroads through the Choctaw and Chickasaw nations to be surveyed and set apart and platted to conform to the respective acts of Congress granting the same in cases where said rights of way are defined by such acts of Congress, but in cases where the acts of Congress do not define the same, then Congress is memorialized to definitely fix the width of said rights of way for station grounds and between stations, so that railroads now constructed through said nations shall have, as near as possible, uniform rights of way; and Congress is also requested to fix uniform rates of fare and freight for all railroads through the Choctaw and Chickasaw nations; branch railroads now constructed and not built according to acts of Congress to pay the same rates for rights of way and station grounds as main lines.

TOWN SITES.

It is further agreed that there shall be appointed a commission for each of the two nations. Each commission shall consist of one member, to be appointed by the executive of the tribe for which said commission is to act, who shall not be interested in town property other than his home, and one to be appointed by the

President of the United States. Each of said commissions shall lay out town sites, to be restricted as far as possible to their present limits, where towns are now located in the nation for which said commission is appointed. Said commission shall have prepared correct and proper plats of each town, and file one in the clerk's office of the United States court for the district in which the town is located, and one with the principal chief or governor of the nation in which the town is located, and one with the Secretary of the Interior, to be approved by him before the same shall take effect. When said towns are so laid out, each lot on which permanent, substantial, and valuable improvements, other than fences, tillage, and temporary houses, have been made, shall be valued by the commission provided for the nation in which the town is located at the price a fee-simple title to the same would bring in the market at the time the valuation is made, but not to include in such value the improvements thereon. The owner of the improvements on each lot shall have the right to buy one residence and one business lot at fifty per centum of the appraised value of such improved property, and the remainder of such improved property at sixty-two and one-half per centum of the said market value within sixty days from date of notice served on him that such lot is for sale, and if he purchases the same he shall, within ten days from his purchase, pay into the Treasury of the United States one-fourth of the purchase price, and the balance in three equal annual installments, and when the entire sum is paid shall be entitled to a patent for the same. In case the two members of the commission fail to agree as to the market value of any lot, or the limit or extent of said town, either of said commissioners may report any such disagreement to the judge of the district in which such town is located, who shall appoint a third member to act with said

commission, who is not interested in town lots, who shall act with them to determine said value.

If such owner of the improvements on any lot fails within sixty days to purchase and make the first payment on same, such lot, with the improvements thereon, shall be sold at public auction to the highest bidder, under the direction of the aforesaid commission, and the purchaser at such sale shall pay to the owner of the improvements the price for which said lot shall be sold, less sixty-two and one-half per cent of said appraised value of the lot, and shall pay the sixty-two and one-half per cent of said appraised value into United States Treasury, under regulations to be established by the Secretary of the Interior, in four installments, as herein before provided. The commission shall have the right to reject any bid on such lot which they consider below its value.

All lots not so appraised shall be sold from time to time at public auction (after proper advertisement) by the commission for the nation in which the town is located, as may seem for the best interest of the nations and the proper development of each town, the purchase price to be paid in four installments, as hereinbefore provided for improved lots. The commission shall have the right to reject any bid for such lots which they consider below its value.

All the payments herein provided for shall be made under the direction of the Secretary of the Interior into the United States Treasury, a failure of sixty days to make any one payment to be a forfeiture of all payments made and all rights under the contract: *Provided*, That the purchaser of any lot shall have the option of paying the entire price of the lot before the same is due.

No tax shall be assessed by any town government against any town lot unsold by the commission, and no tax levied against a lot sold, as herein provided, shall constitute a lien on same till the purchase price thereof has been fully paid to the nation.

The money paid into the United States Treasury for the sale of all town lots shall be for the benefit of the members of the Choctaw and Chickasaw tribes (freedmen excepted), and at the end of one year from the ratification of this agreement, and at the end of each year thereafter, the funds so accumulated shall be divided and paid to the Choctaws and Chickasaws (freedmen excepted), each member of the two tribes to receive an equal portion thereof.

That no law or ordinance shall be passed by any town which interferes with the enforcement of or is in conflict with the laws of the United States in force in said Territory, and all persons in such towns shall be subject to said laws, and the United States agrees to maintain strict laws in the territory of the Choctaw and Chickasaw tribes against the introduction, sale, barter, or giving away of liquors and intoxicants of any kind or quality.

That said commission shall be authorized to locate, within a suitable distance from each town site, not to exceed five acres to be used as a cemetery, and when any town has paid into the United States Treasury, to be part of the fund arising from the sale of town lots, ten dollars per acre therefor, such town shall be entitled to a patent for the same, as herein provided for titles to allottees, and shall dispose of same at reasonable prices in suitable lots for burial purposes, the proceeds derived from such sale to be applied by the

town government to the proper improvement and care of said cemetery.

That no charge or claim shall be made against the Choctaw or Chickasaw tribes by the United States for the expenses of surveying and platting the lands and town sites, or for grading, appraising, and allotting the lands, or for appraising and disposing of the town lots as herein provided.

That the land adjacent to Fort Smith, and lands for court-houses, jails, and other public purposes excepted from allotment, shall be disposed of in the same manner and for the same purposes as provided for town lots herein, but not till the Choctaw and Chickasaw councils shall direct such disposition to be made thereof, and said land adjacent thereto shall be placed under the jurisdiction of the city of Fort Smith, Arkansas, for police purposes.

There shall be set apart and exempted from appraisement and sale in the towns, lots upon which churches and parsonages are now built and occupied, not to exceed fifty feet front and one hundred feet deep for each church or parsonage: *Provided*, That such lots shall only be used for churches and parsonages, and when they cease to be used shall revert to the members of the tribes to be disposed of as other town lots: *Provided further*, That these lots may be sold by the churches for which they are set apart if the purchase money therefor is invested in other lot or lots in the same town, to be used for the same purpose and with the same conditions and limitations.

It is agreed that all the coal and asphalt within the limits of the Choctaw and Chickasaw nations shall remain and be the common property of the members of the Choctaw and Chickasaw tribes (freedmen excepted), so

that each and every member shall have an equal and undivided interest in the whole; and no patent provided for in this agreement shall convey any title thereto. The revenues from coal and asphalt, or so much as shall be necessary, shall be used for the education of the children of Indian blood of the members of said tribes. Such coal and asphalt mines as are now in operation, and all others which may hereafter be leased and operated, shall be under the supervision and control of the two trustees, who shall be appointed by the President of the United States, one on the recommendation of the principal chief of the Choctaw Nation, who shall be a Choctaw by blood, whose term shall be for four years, and one on the recommendation of the governor of the Chickasaw Nation, who shall be a Chickasaw by blood, whose term shall be for two years; after which the term of appointees shall be four years. Said trustees, or either of them, may at any time be removed by the President of the United States for good cause shown. They shall each give bond for the faithful performance of their duties, under such rules as may be prescribed by the Secretary of the Interior. Their salaries shall be fixed and paid by their respective nations, each of whom shall make full report of all his acts to the Secretary of the Interior quarterly. All such acts shall be subject to the approval of said Secretary.

All coal and asphalt mines in the two nations, whether now developed or to be hereafter developed, shall be operated, and the royalties therefrom paid into the Treasury of the United States, and shall be drawn therefrom under such rules and regulations as shall be prescribed by the Secretary of the Interior.

All contracts made by the national agents of the Choctaw and Chickasaw nations for operating coal and asphalt with any person or corporation which were, on

April twenty-third, eighteen hundred and ninety-seven, being operated in good faith, are hereby ratified and confirmed, and the lessee shall have the right to renew the same when they expire, subject to all the provisions of this act.

All agreements heretofore made by any person or corporation with any member or members of the Choctaw or Chickasaw nations, the object of which was to obtain such member or member's permission to operate coal or asphalt, are hereby declared void: *Provided*, That nothing herein contained shall impair the rights of any holder or owner of a leasehold interest in any oil, coal rights, asphalt, or mineral which have been assented to by act of Congress, but all such interests shall continue unimpaired hereby, and shall be assured by new leases from such trustees of coal or asphalt claims described therein by application to the trustees within six months after the ratification of this agreement, subject, however, to payment of advance royalties herein provided for.

All leases under this agreement shall include the coal or asphaltum or other mineral, as the case may be, in or under nine hundred and sixty acres, which shall be in a square as nearly as possible and shall be for thirty years. The royalty on coal shall be fifteen cents per ton of two thousand pounds on all coal mined, payable on the 25th day of the month next succeeding that in which it is mined. Royalty on asphalt shall be sixty cents per ton, payable same as coal: *Provided*, That the Secretary of the Interior may reduce or advance royalties on coal and asphalt when he deems it for the best interests of the Choctaws and Chickasaws to do so. No royalties shall be paid except into the United States Treasury, as herein provided.

All lessees shall pay on each coal or asphalt claim at the rate of one hundred dollars per annum, in advance, for the first and second years; two hundred dollars per annum, in advance, for the third and fourth years; and five hundred dollars for each succeeding year thereafter. All such payments shall be treated as advanced royalty on the mine or claim on which they are made, and shall be a credit as royalty when each said mine is developed and operated and its production is in excess of such guaranteed annual advance payments; and all persons having coal leases must pay said annual advanced payments on each claim whether developed or undeveloped: *Provided, however*, That should any lessee neglect or refuse to pay such advanced annual royalty for the period of sixty days after the same becomes due and payable on any lease, the lease on which default is made shall become null and void, and the royalties paid in advance thereon shall then become and be the money and property of the Choctaw and Chickasaw nations.

In surface, the use of which is reserved to present coal operators, shall be included such lots in towns as are occupied by lessees' houses—either occupied by said lessees' employees or as offices or warehouses: *Provided, however*, That in those town sites designated and laid out under the provision of this agreement where coal leases are now being operated and coal is being mined, there shall be reserved from appraisement and sale all lots occupied by houses of miners actually engaged in mining, and only while they are so engaged, and in addition thereto a sufficient amount of land to be determined by the town-site board of appraisers, to furnish homes for the men actually engaged in working for the lessees operating said mines and a sufficient amount for all buildings and machinery for mining

purposes: *And provided further*, That when the lessees shall cease to operate said mines, then and in that event the lots of land so reserved shall be disposed of by the coal trustees for the benefit of the Choctaw and Chickasaw tribes.

That whenever the members of the Choctaw and Chickasaw tribes shall be required to pay taxes for the support of schools, then the fund arising from such royalties shall be disposed of for the equal benefit of their members (freedmen excepted) in such manner as the tribes may direct.

It is further agreed that the United States courts now existing, or that may hereafter be created, in the Indian Territory shall have exclusive jurisdiction of all controversies growing out of the titles, ownership, occupation, possession, or use of real estate, coal, and asphalt in the territory occupied by the Choctaw and Chickasaw tribes; and of all persons charged with homicide, embezzlement, bribery and embracery, breaches or disturbances of the peace, and carrying weapons, hereafter committed in the territory of said tribe, without reference to race or citizenship of the person or persons charged with such crime; and any citizen or officer of the Choctaw or Chickasaw nations charged with such crime shall be tried and, if convicted, punished as though he were a citizen or officer of the United States.

And sections sixteen hundred and thirty-six to sixteen hundred and forty-four, inclusive, entitled "Embezzlement," and sections seventeen hundred and eleven to seventeen hundred and eighteen, inclusive, entitled "Bribery and embracery," of Mansfield's Digest of the Laws of Arkansas, are hereby extended over and put in force in the Choctaw and Chickasaw nations; and the word "officer," where the same appears in said

laws, shall include all officers of the Choctaw and Chickasaw governments; and the fifteenth section of the act of Congress entitled "An act to establish United States courts in the Indian Territory, and for other purposes," approved March first, eighteen hundred and eighty-nine, limiting jurors to citizens of the United States, shall be held not to apply to United States courts in the Indian Territory held within the limits of the Choctaw and Chickasaw nations; and all members of the Choctaw and Chickasaw tribes, otherwise qualified, shall be competent jurors in said courts: *Provided*, That whenever a member of the Choctaw and Chickasaw nations is indicted for homicide, he may, within thirty days after such indictment and his arrest thereon, and before the same is reached for trial, file with the clerk of the court in which he is indicted his affidavit that he can not get a fair trial in said court; and it thereupon shall be the duty of the judge of said court to order a change of venue in such case to the United States district court for the western district of Arkansas, at Fort Smith, Arkansas, or to the United States district court for the eastern district of Texas, at Paris, Texas, always selecting the court that in his judgment is nearest or most convenient to the place where the crime charged in the indictment is supposed to have been committed, which courts shall have jurisdicition to try the case; and in all said civil suits said courts shall have full equity powers; and whenever it shall appear to said court, at any stage in the hearing of any case, that the tribe is in any way interested in the subject-matter in controversy, it shall have power to summon in said tribe and make the same a party to the suit and proceed therein in all respects as if such tribe were an original party thereto; but in no case shall suit be instituted against the tribal government without its consent.

It is further agreed that no act, ordinance, or resolution of the council of either the Choctaw or Chickasaw tribes, in any manner affecting the land of the tribe, or of the individuals, after allotment, or the moneys or other property of the tribe or citizen thereof (except appropriations for the regular and necessary expenses of the government of the respective tribes), or the rights of any persons to employ any kind of labor, or the rights of any persons who have taken or may take the oath of allegiance to the United States, shall be of any validity until approved by the President of the United States. When such acts, ordinances, or resolutions passed by the council of either of said tribes shall be approved by the governor thereof, then it shall be the duty of the national secretary of said tribe to forward them to the President of the United States, duly certified and sealed, who shall, within thirty days after their reception, approve or disapprove the same. Said acts, ordinances, or resolutions, when so approved, shall be published in at least two newspapers having a bona fide circulation in the tribe to be affected thereby, and when disapproved shall be returned to the tribe enacting the same.

It is further agreed, in view of the modification of legislative authority and judicial jurisdiction herein provided, and the necessity of the continuance of the tribal governments so modified, in order to carry out the requirements of this agreement, that the same shall continue for the period of eight years from the fourth day of March, eighteen hundred and ninety-eight. This stipulation is made in the belief that the tribal governments so modified will prove so satisfactory that there will be no need or desire for further change till the lands now occupied by the Five Civilized Tribes shall, in the opinion of Congress, be prepared for admission as a State to the Union. But this provision shall not be

construed to be in any respect an abdication by Congress of power at any time to make needful rules and regulations respecting said tribes.

That all per capita payments hereafter made to the members of the Choctaw or Chickasaw nations shall be paid directly to each individual member by a bonded officer of the United States, under the direction of the Secretary of the Interior, which officer shall be required to give strict account of such disbursements to said Secretary.

That the following sum be, and is hereby, appropriated, out of any money in the Treasury not otherwise appropriated, for fulfilling treaty stipulations with the Chickasaw Nation of Indians, namely:

For arrears of interest, at five per centum per annum, from December thirty-first, eighteen hundred and forty, to June thirtieth, eighteen hundred and eighty-nine, on one hundred and eighty-four thousand one hundred and forty-three dollars and nine cents of the trust fund of the Chickasaw Nation erroneously dropped from the books of the United States prior to December thirty-first, eighteen hundred and forty, and restored December twenty-seventh, eighteen hundred and eighty-seven, by the award of the Secretary of the Interior, under the fourth article of the treaty of June twenty-second, eighteen hundred and fifty-two, and for arrears of interest, at five per centum per annum, from March eleventh, eighteen hundred and fifty, to March third, eighteen hundred and ninety, on fifty-six thousand and twenty-one dollars and forty-nine cents of the trust fund of the Chickasaw Nation erroneously dropped from the books of the United States March eleventh, eighteen hundred and fifty, and restored December twenty-seventh, eighteen hundred and eighty-seven, by the award of the

Secretary of the Interior, under the fourth article of the treaty of June twenty-second, eighteen hundred and fifty-two, five hundred and fifty-eight thousand and twenty dollars and fifty-four cents, to be placed to the credit of the Chickasaw Nation with the fund to which it properly belongs: *Provided*, That if there be any attorneys' fees to be paid out of same, on contract heretofore made and duly approved by the Secretary of the Interior, the same is authorized to be paid by him.

It is further agreed that the final decision of the courts of the United States in the case of the Choctaw Nation and the Chickasaw Nation against the United States and the Wichita and affiliated bands of Indians, now pending, when made, shall be conclusive as the basis of settlement as between the United States and said Choctaw and said Choctaw and Chickasaw nations for the remaining lands in what is known as the "Leased District," namely, the land lying between the ninety-eighth and one hundredth degrees of west longitude and between the Red and Canadian rivers, leased to the United States by the treaty of eighteen hundred and fifty-five, except that portion called the Cheyenne and Arapahoe country, heretofore acquired by the United States, and all final judgments rendered against said nations in any of the courts of the United States in favor of the United States or any citizen thereof shall first be paid out of any sum hereafter found due said Indians for any interest they may have in the so-called "Leased District."

It is further agreed that all of the funds invested, in lieu of investment, treaty funds, or otherwise, now held by the United States in trust for the Choctaw and Chickasaw tribes, shall be capitalized within one year after the tribal governments shall cease, so far as the same may legally be done, and be appropriated and paid, by

some officer of the United States appointed for the purpose, to the Choctaws and Chickasaws (freedmen excepted) per capita, to aid and assist them in improving their homes and lands.

It is further agreed that the Choctaws and Chickasaws, when their tribal governments cease, shall become possessed of all the rights and privileges of citizens of the United States.

ORPHAN LANDS.

It is further agreed that the Choctaw orphan lands in the State of Mississippi, yet unsold, shall be taken by the United States at one dollar and twenty-five cents ($1.25) per acre, and the proceeds placed to the credit of the Choctaw orphan fund in the Treasury of the United States, the number of acres to be determined by the General Land Office.

In witness whereof the said commissioners do hereunto affix their names, at Atoka, Indian Territory, this the twenty-third day of April, eighteen hundred and ninety-seven.

GREEN MCCURTAIN,
Principal Chief.
J. S. STANDLEY,
N. B. AINSWORTH,
BEN HAMPTON,
WESLEY ANDERSON,
AMOS HENRY,
D. C. GARLAND,
Choctaw Commission.
R. M. HARRIS,
Governor.
ISAAC O. LEWIS,
HOLMES COLBERT,
ROBERT L. MURRAY,

WILLIAM PERRY,
R. L. BOYD,
Chickasaw Commission.
FRANK C. ARMSTRONG,
Acting Chairman.
ARCHIBALD S. MCKENNON,
THOMAS B. CABANISS,
ALEXANDER B. MONTGOMERY,
Commission to the Five Civilized Tribes.
H. M. JACOWAY, JR.,
Secretary Five Tribes Commission.

[Act of July 1, 1898 (30 Stat. L., 591).]

For salaries of four commissioners appointed under acts of Congress approved March third, eighteen hundred and ninety-three and March second, eighteen hundred and ninety-five, to negotiate with the Five Civilized Tribes in the Indian Territory, twenty thousand dollars: *Provided*, That the number of said commissioners is hereby fixed at four. For expenses of commissioners and necessary expenses of employees, fifteen hundred dollars, to be immediately available: *And provided further*, That three dollars per diem for expenses of a clerk detailed as special disbursing agent by Interior Department, while on duty with the Commission, shall be paid therefrom; for clerical help, including secretary of the Commission and interpreters, six thousand six hundred dollars, and authority is hereby given for the payment of such interpreters as may have been employed and paid by said Commission during the fiscal year eighteen hundred and ninety-eight; for contingent expenses of the Commission, one thousand eight hundred dollars; in all, forty-three thousand four hundred dollars.

That said Commission shall continue to exercise all authority heretofore conferred on it by law.

Appeals shall be allowed from the United States courts in the Indian Territory direct to the Supreme Court of of the United States to either party, in all citizenship cases, and in all cases between either of the Five Civilized Tribes and the United States involving the constitutionality or validity of any legislation affecting citizenship, or the allotment of lands in the Indian Territory, under the rules and regulations governing appeals to said court in other cases: *Provided*, That appeals in cases decided prior to this act must be perfected in one

hundred and twenty days from its passage; and in cases decided subsequent thereto, within sixty days from final judgment; but in no such case shall the work of the Commission to the Five Civilized Tribes he enjoined or suspended by any proceeding in or order of any court, or of any judge, until after final judgment in the Supreme Court of the United States. In case of appeals, as aforesaid, it shall be the duty of the Supreme Court to advance such cases on the docket and dispose of the same as early as possible.

[Act of May 31, 1900 (31 Stat. L., 221).]

For salaries of four commissioners, appointed under acts of Congress approved March third, eighteen hundred and ninety-three, and March second, eighteen hundred and ninety-five, to negotiate with the Five Civilized Tribes in the Indian Territory, twenty thousand dollars: *Provided*, That the number of said commissioners is hereby fixed at four. For expenses of commissioners and necessary expenses of employees, and three dollars per diem for expenses of a clerk detailed as special disbursing agent by Interior Department, while on duty with the Commission, shall be paid therefrom; for clerical help, including secretary of the Commission and interpreters, five hundred thousand dollars, to be immediately available; for contingent expenses of the Commission, four thousand dollars; in all, five hundred and twenty-four thousand dollars: *Provided further*, That this appropriation may be used by said Commission in the prosecution of all work to be done by or under its direction as required by statute.

That said Commission shall continue to exercise all authority heretofore conferred on it by law. But it shall not receive, consider, or make any record of any application of any person for enrollment as a member of any tribe in Indian Territory who has not been a recognized citizen thereof, and duly and lawfully enrolled or admitted as such, and its refusal of such applications shall be final when approved by the Secretary of the Interior: *Provided*, That any Mississippi Choctaw duly identified as such by the United States Commission to the Five Civilized Tribes shall have the right, at any time prior to the approval of the final rolls of the Choctaws and Chickasaws by the Secretary of the Interior, to make settlement within the Choctaw-Chickasaw country, and on proof of the fact of bona fide settlement may be en-

rolled by the said United States Commission and by the Secretary of the Interior as Choctaws entitled to allotment: *Provided further*, That all contracts or agreements looking to the sale or incumbrance in any way of the lands to be allotted to said Mississippi Choctaws shall be null and void.

To pay all expenses incident to the survey, platting, and appraisement of town sites in the Choctaw, Chickasaw, Creek, and Cherokee nations, Indian Territory, as required by sections fifteen and twenty-nine of an act entitled "An act for the protection of the people of the Indian Territory, and for other purposes," approved June twenty-eighth, eighteen hundred and ninety-eight, for the balance of the current year and for the year ending June thirtieth, nineteen hundred and one, the same to be immediately available, sixty-seven thousand dollars or so much as may be necessary: *Provided*, That the Secretary of the Interior is hereby authorized, under rules and regulations to be prescribed by him, to survey, lay out, and plat into town lots, streets, alleys, and parks the sites of such towns and villages in the Choctaw, Chickasaw, Creek and Cherokee nations as may at that time have a population of two hundred or more in such manner as will best subserve the then present needs and the reasonable prospective growth of such towns. The work of surveying, laying out, and platting such town sites shall be done by competent surveyors, who shall prepare five copies of the plat of each town site, which, when the survey is approved by the Secretary of the Interior, shall be filed as follows: One in the office of the Commissioner of Indian Affairs, one with the principal chief of the nation, one with the clerk of the court within the territorial jurisdiction of which the town is located, one with the Commission to the Five Civilized Tribes, and one with the town authorities, if

there be such. Where in his judgment the best interests of the public service require, the Secretary of the Interior may secure the surveying, laying out, and platting of town sites in any of said nations by contract.

Hereafter the work of the respective town-site commissions provided for in the agreement with the Choctaw and Chickasaw tribes ratified in section twenty-nine of the act of June twenty-eighth, eighteen hundred and ninety-eight, entitled, "An act for the protection of the people of the Indian Territory, and for other purposes," shall begin as to any town site immediately upon the approval of the survey by the Secretary of the Interior and not before.

The Secretary of the Interior may in his discretion appoint a town-site commission consisting of three members for each of the Creek and Cherokee nations, at least one of whom shall be a citizen of the tribe, and shall be appointed upon the nomination of the principal chief of the tribe. Each commission, under the supervision of the Secretary of the Interior, shall appraise and sell for the benefit of the tribe the town lots in the nation for which it is appointed, acting in conformity with the provisions of any then existing act of Congress or agreement with the tribe approved by Congress. The agreement of any two members of the commission as to the true value of any lot shall constitute a determination thereof, subject to the approval of the Secretary of the Interior, and if no two members are able to agree the matter shall be determined by such Secretary.

Where in his judgment the public interests will be thereby subserved, the Secretary of the Interior may appoint in the Choctaw, Chickasaw, Creek, or Cherokee nation a separate town site commission for any town, in which event as to that town such local commission may

exercise the same authority and perform the same duties which would otherwise devolve upon the commission for that nation. Every such local commission shall be appointed in the manner provided in the act approved June twenty-eighth, eighteen hundred and ninety-eight, entitled, "An act for the protection of the people of the Indian Territory."

The Secretary of the Interior, where in his judgment the public interests will be thereby subserved, may permit the authorities of any town in any of said nations, at the expense of the town, to survey, lay out, and plat the site thereof, subject to his supervision and approval as in other instances.

As soon as the plat of any town site is approved, the proper commission shall, with all reasonable dispatch and within a limited time, to be prescribed by the Secretary of the Interior, proceed to make the appraisement of the lots and improvements, if any, thereon, and after the approval thereof by the Secretary of the Interior, shall, under the supervision of such Secretary, proceed to the disposition and sale of the lots in conformity with any then existing act of Congress or agreement with the tribe approved by Congress, and if the proper commission shall not complete such appraisement and sale within the time limited by the Secretary of the Interior, they shall receive no pay for such additional time as may be taken by them, unless the Secretary of the Interior, for good cause shown, shall expressly direct otherwise.

The Secretary of the Interior may, for good cause, remove any member of any town-site commission, tribal or local, in any of said nations, and may fill the vacancy thereby made or any vacancy otherwise occurring in like manner as the place was originally filled.

It shall not be required that the town-site limits established in the course of the platting and disposing of town lots and the corporate limits of the town, if incorporated, shall be identical or coextensive, but such town-site limits and corporate limits shall be so established as to best subserve the then present needs and the reasonable prospective growth of the town, as the same shall appear at the times when such limits are respectively established: *Provided further*, That the exterior limits of all town sites shall be designated and fixed at the earliest practicable time under rules and regulations prescribed by the Secretary of the Interior.

Upon the recommendation of the Commission to the Five Civilized Tribes the Secretary of the Interior is hereby authorized at any time before allotment to set aside and reserve from allotment any lands in the Choctaw, Chickasaw, Creek, or Cherokee nations, not exceeding one hundred and sixty acres in any one tract, at such stations as are or shall be established in conformity with law on the line of any railroad which shall be constructed or be in process of construction in or through either of said nations prior to the allotment of the lands therein, and this irrespective of the population of such town site at the time. Such town sites shall be surveyed, laid out, and platted, and the lands therein disposed of for the benefit of the tribe in the manner herein prescribed for other town sites: *Provided further*, That whenever any tract of land shall be set aside as herein provided which is occupied by a member of the tribe, such occupant shall be fully compensated for his improvements thereon under such rules and regulations as may be prescribed by the Secretary of the Interior.

Nothing herein contained shall have the effect of avoiding any work heretofore done in pursuance of the

said act of June twenty-eighth, eighteen hundred and ninety-eight, in the way of surveying, laying out, or platting of town sites, appraising or disposing of town lots in any of said nations, but the same, if not heretofore carried to a state of completion, may be completed according to the provisions hereof.

[Act of March 3, 1901 (31 Stat. L., 1073).]

For salaries of four commissioners, appointed under acts of Congress approved March third, eighteen hundred and ninety-three, and March second, eighteen hundred and ninety-five, to negotiate with the Five Civilized Tribes in the Indian Territory, twenty thousand dollars: *Provided*, That the number of said commissioners is hereby fixed at four. For expenses of commissioners and necessary expenses of employees, and three dollars per diem for expenses of a clerk detailed as special disbursing agent by Interior Department, while on duty with the Commission, shall be paid therefrom; for clerical help, including secretary of the Commission and interpreters, three hundred thousand dollars; for contingent expenses of the Commission, four thousand dollars; in all, three hundred and twenty-four thousand dollars: *Provided further*, That this appropriation may be used by said Commission in the prosecution of all work to be done by or under its direction as required by law; and said commissioners shall at once make an itemized statement to the Secretary of the Interior of all their expenditures up to January first, nineteen hundred and one, and annually thereafter: *And provided further*, That not to exceed ten thousand four hundred dollars of the above amount may be used in the temporary employment in the office of the Commissioner of Indian Affairs of three clerks, at the rate of one thousand six hundred dollars per annum, who shall be competent to examine records in disputed citizenship cases and law contests growing out of the work of said Commission, and in the temporary employment in said office of three competent stenographers, at the rate of one thousand dollars each per annum, to be immediately available.

* * * * * * * *

The rolls made by the Commission to the Five Civilized Tribes, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon shall alone constitute the several tribes which they represent; and the Secretary of the Interior is authorized and directed to fix a time by agreement with said tribes or either of them for closing said rolls, but upon failure or refusal of said tribes or any of them to agree thereto, then the Secretary of the Interior shall fix a time for closing said rolls, after which no name shall be added thereto.

That no act, ordinance, or resolution of the Creek or Cherokee tribes, except resolutions for adjournment, shall be of any validity until approved by the President of the Unted States. When such acts, ordinances, or resolutions passed by the council of either of said tribes shall be approved by the principal chief thereof, then it shall be the duty of the national secretary of said tribe to forward them to the President of the United States, duly certified and sealed, who shall, within thirty days after their reception, approve or disapprove the same. Said acts, ordinances, or resolutions, when so approved, shall be published in at least two newspapers having a bona fide circulation in the tribe to be affected thereby, and when disapproved shall be returned to the tribe enacting the same.

Creek agreement, March 8, 1900.
[31 Stat. L., 861.]

AN ACT To ratify and confirm an agreement with the Muscogee or Creek tribe of Indians, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the agreement negotiated between the Commission to the Five Civilized Tribes and the Muskogee or Creek tribe of Indians at the city of Washington on the eighth day of March, nineteen hundred, as herein amended, is hereby accepted, ratified, and confirmed, and the same shall be of full force and effect when ratified by the Creek national council. The principal chief, as soon as practicable after the ratification of this agreement by Congress, shall call an extra session of the Creek national council and lay before it this agreement and the act of Congress ratifying it, and if the agreement be ratified by said council, as provided in the constitution of said nation, he shall transmit to the President of the United States the act of council ratifying the agreement, and the President of the United States shall thereupon issue his proclamation declaring the same duly ratified, and that all the provisions of this agreement have become law according to the terms thereof: *Provided*, That such ratification by the Creek national council shall be made within ninety days from the approval of this act by the President of the United States.

This agreement by and between the United States, entered into in its behalf by the Commission to the Five Civilized Tribes, Henry L. Dawes, Tams Bixby, Archibald S. McKennon, and Thomas B. Needles, duly appointed and authorized thereunto, and the Muskogee

(or Creek) tribe of Indians, in Indian Territory, entered into in behalf of said tribe by Pleasant Porter, principal chief, and George A. Alexander, David M. Hodge, Isparhecher, Albert P. McKellop, and Cub McIntosh, delegates, duly appointed and authorized thereunto.

Witnesseth that in consideration of the mutual undertakings herein contained it is agreed as follows:

DEFINITIONS.

1. The words "Creek" and "Muskogee," as used in this agreement, shall be deemed synonymous, and the words "Creek Nation" and "tribe" shall each be deemed to refer to the Muskogee Nation or Muskogee tribe of Indians in Indian Territory. The words "principal chief" shall be deemed to refer to the principal chief of the Muskogee Nation. The words "citizen" or "citizens" shall be deemed to refer to a member or members of the Muskogee tribe or nation of Indians. The words "The Dawes Commission" or "Commission" shall be deemed to refer to the United States Commission to the Five Civilized Tribes.

GENERAL ALLOTMENT OF LANDS.

2. All lands belonging to the Creek tribe of Indians in the Indian Territory, except town sites and lands herein reserved for Creek schools and public buildings, shall be appraised at their true value, excluding only lawful improvements on lands in actual cultivation. The appraisement shall be made under direction of the Dawes Commission by such number of committees, with necessary assistance, as may be deemed necessary to expedite the work, one member of each committee to be appointed by the principal chief; and if the members of any committee fail to agree as to the value of any

tract of land, the value thereof shall be fixed by said Commission. Each committee shall make report of its work to said Commission, which shall from time to time prepare reports of same, in duplicate, and transmit them to the Secretary of the Interior for his approval, and when approved one copy thereof shall be returned to the office of said Commission for its use in making allotments as herein provided.

3. All lands of said tribe, except as herein provided, shall be allotted among the citizens of the tribe by said Commission so as to give each an equal share of the whole in value, as nearly as may be, in manner following: There shall be allotted to each citizen one hundred and sixty acres of land—boundaries to conform to the government survey—which may be selected by him so as to include improvements which belong to him. One hundred and sixty acres of land, valued at six dollars and fifty cents per acre, shall constitute the standard value of an allotment, and shall be the measure for the equalization of values; and any allottee receiving lands of less than such standard value may, at any time, select other lands which at their appraised value are sufficient to make his allotment equal in value to the standard so fixed.

If any citizen select lands, the appraised value of which, for any reason, is in excess of such standard value, the excess of value shall be charged against him in the future distribution of the funds of the tribe arising from all sources whatsoever, and he shall not receive any further distribution of property or funds of the tribe until all other citizens have received lands and money equal in value to his allotment. If any citizen select lands the appraised value of which is in excess of such standard value, he may pay the overplus in money, but if he fail to do so, the same shall be charged

against him in the future distribution of the funds of the tribe arising from all sources whatsoever, and he shall not receive any further distribution of property or funds until all other citizens shall have received lands and funds equal in value to his allotment; and if there be not sufficient funds of the tribe to make the allotments of all other citizens of the tribe equal in value to his, then the surplus shall be a lien upon the rents and profits of his allotment until paid.

4. Allotment for any minor may be selected by his father, mother, or guardian, in the order named, and shall not be sold during his minority. All guardians or curators appointed for minors and incompetents shall be citizens.

Allotments may be selected for prisoners, convicts, and aged and infirm persons by their duly appointed agents, and for incompetents by guardians, curators, or suitable persons akin to them, but it shall be the duty of said Commission to see that such selections are made for the best interests of such parties.

5. If any citizen have in his possession, in actual cultivation, lands in excess of what he and his wife and minor children are entitled to take, he shall, within ninety days after the ratification of this agreement, select therefrom allotments for himself and family aforesaid, and if he have lawful improvements upon such excess he may dispose of the same to any other citizen, who may thereupon select lands so as to include such improvements; but, after the expiration of ninety days from the ratification of this agreement, any citizen may take any lands not already selected by another; but if lands so taken be in actual cultivation, having thereon improvements belonging to another citizen, such improvements shall be valued by the appraisement com-

mittee, and the amount paid to the owner thereof by the allottee, and the same shall be a lien upon the rents and profits of the land until paid: *Provided*, That the owner of improvements may remove the same if he desires.

6. All allotments made to Creek citizens by said Commission prior to the ratification of this agreement, as to which there is no contest, and which do not include public property, and are not herein otherwise affected, are confirmed, and the same shall, as to appraisement and all things else, be governed by the provisions of this agreement; and said Commission shall continue the work of allotment of Creek lands to citizens of the tribe as heretofore, conforming to provisions herein; and all controversies arising between citizens as to their right to select certain tracts of land shall be determined by said Commission.

7. Lands allotted to citizens hereunder shall not in any manner whatsoever or at any time be incumbered, taken, or sold to secure or satisfy any debt or obligation contracted or incurred prior to the date of the deed to the allottee therefor, and such lands shall not be alienable by the allottee or his heirs at any time before the expiration of five years from the ratification of this agreement, except with the approval of the Secretary of the Interior.

Each citizen shall select from his allotment forty acres of land as a homestead, which shall be nontaxable and inalienable and free from any incumbrance whatever for twenty-one years, for which he shall have a separate deed, conditioned as above: *Provided*, That selections of homesteads for minors, prisoners, convicts, incompetents, and aged and infirm persons, who can not select for themselves, may be made in the manner

herein provided for the selection of their allotments; and if, for any reason, such selection be not made for any citizen, it shall be the duty of said Commission to make selection for him.

The homestead of each citizen shall remain, after the death of the allottee, for the use and support of children born to him after the ratification of this agreement, but if he have no such issue, then he may dispose of his homestead by will, free from limitation herein imposed, and if this be not done, the land shall descend to his heirs, according to the laws of descent and distribution of the Creek Nation, free from such limitation.

8. The Secretary of the Interior shall, through the United States Indian agent in said Territory, immediately after the ratification of this agreement, put each citizen who has made selection of his allotment in unrestricted possession of his land and remove therefrom all persons objectionable to him; and when any citizen shall thereafter make selection of his allotment as herein provided, and receive certificate therefor, he shall be immediately thereupon so placed in possession of his land.

9. When allotment of one hundred and sixty acres has been made to each citizen, the residue of lands, not herein reserved or otherwise disposed of, and all the funds arising under this agreement shall be used for the purpose of equalizing allotments, and if the same be insufficient therefor the deficiency shall be supplied out of any other funds of the tribe, so that the allotments of all citizens may be made equal in value, as nearly as may be, in manner herein provided.

TOWN SITES.

10. All towns in the Creek Nation having a present population of two hundred or more shall, and all others

may, be surveyed, laid out, and appraised under the provisions of an act of Congress entitled "An act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, nineteen hundred and one, and for other purposes," approved May thirty-first, nineteen hundred, which said provisions are as follows:

That the Secretary of the Interior is hereby authorized under rules and regulations to be prescribed by him, to survey, lay out, and plat into town lots, streets, alleys, and parks the sites of such towns and villages in the Choctaw, Chickasaw, Creek, and Cherokee nations, as may at that time have a population of two hundred or more, in such manner as will best subserve the then present needs and the reasonable prospective growth of such towns. The work of surveying, laying out, and platting such town sites shall be done by competent surveyors, who shall prepare five copies of the plat of each town site, which, when the survey is approved by the Secretary of the Interior, shall be filed as follows: One in the office of the Commissioner of Indian Affairs, one with the principal chief of the nation, one with the clerk of the court within the territorial jurisdiction of which the town is located, one with the Commission to the Five Civilized Tribes, and one with the town authorities, if there be such. Where in his judgment the best interests of the public service require, the Secretary of the Interior may secure the surveying, laying out, and platting of town sites in any of said nations by contract.

Hereafter the work of the respective town-site commissions provided for in the agreement with the Choctaw and Chickasaw tribes ratified in section twenty-nine of the act of June twenty-eighth, eighteen hundred and ninety-eight, entitled "An act for the protection of the

people of the Indian Territory, and for other purposes," shall begin as to any town site immediately upon the approval of the survey by the Secretary of the Interior, and not before.

The Secretary of the Interior may, in his discretion, appoint a town-site commission consisting of three members for each of the Creek and Cherokee nations, at least one of whom shall be a citizen of the tribe and shall be appointed upon the nomination of the principal chief of the tribe. Each commission, under the supervision of the Secretary of the Interior, shall appraise and sell for the benefit of the tribe the town lots in the nation for which it is appointed, acting in conformity with the provisions of any then existing act of Congress or agreement with the tribe approved by Congress. The agreement of any two members of the commission as to the true value of any lot shall constitute a determination thereof, subject to the approval of the Secretary of the Interior, and if no two members are able to agree the matter shall be determined by such Secretary.

Where in his judgment the public interests will be thereby subserved, the Secretary of the Interior may appoint in the Choctaw, Chickasaw, Creek, or Cherokee nation a separate town-site commission for any town, in which event as to that town such local commission may exercise the same authority and perform the same duties which would otherwise devolve upon the commission for that nation. Every such local commission shall be appointed in the manner provided in the act approved June twenty-eighth, eighteen hundred and ninety-eight, entitled "An act for the protection of the people of the Indian Territory."

The Secretary of the Interior, where in his judgment the public interests will be thereby subserved, may per-

mit the authorities of any town in any of said nations, at the expense of the town, to survey, lay out, and plat the site thereof, subject to his supervision and approval, as in other instances.

As soon as the plat of any town site is approved, the proper commission shall with all reasonable dispatch and within a limited time, to be prescribed by the Secretary of the Interior, proceed to make the appraisement of the lots and improvements, if any, thereon, and after the approval thereof by the Secretary of the Interior, shall, under the supervision of such Secretary, proceed to the disposition and sale of the lots in conformity with any then existing act of Congress or agreement with the tribe approved by Congress, and if the proper commission shall not complete such appraisement and sale within the time limited by the Secretary of the Interior, they shall receive no pay for such additional time as may be taken by them, unless the Secretary of the Interior for good cause shown shall expressly direct otherwise.

The Secretary of the Interior may, for good cause, remove any member of any townsite commission, tribal or local, in any of said nations, and may fill the vacancy thereby made or any vacancy otherwise occurring in like manner as the place was originally filled.

It shall not be required that the town-site limits established in the course of the platting and disposing of town lots and the corporate limits of the town, if incorporated, shall be identical or coextensive, but such town-site limits and corporate limits shall be so established as to best subserve the then present needs and the reasonable prospective growth of the town, as the same shall appear at the times when such limits are respectively established: *Provided further*, That the ex-

terior limits of all town sites shall be designated and fixed at the earliest practicable time under rules and regulations prescribed by the Secretary of the Interior.

Upon the recommendation of the Commission to the Five Civilized Tribes the Secretary of the Interior is hereby authorized at any time before allotment to set aside and reserve from allotment any lands in the Choctaw, Chickasaw, Creek, or Cherokee nations, not exceeding one hundred and sixty acres in any one tract, at such stations as are or shall be established in conformity with law on the line of any railroad which shall be constructed or be in process of construction in or through either of said nations prior to the allotment of the lands therein, and this irrespective of the population of such town site at the time. Such town sites shall be surveyed, laid out, and platted, and the lands therein disposed of for the benefit of the tribe in the manner herein prescribed for other town sites: *Provided further*, That whenever any tract of land shall be set aside as herein provided which is occupied by a member of the tribe, such occupant shall be fully compensated for his improvements thereon under such rules and regulations as may be prescribed by the Secretary of the Interior: *Provided*, That hereafter the Secretary of the Interior may, whenever the chief executive or principal chief of said nation fails or refuses to appoint a town-site commissioner for any town or to fill any vacancy caused by the neglect or refusal of the town-site commissioner appointed by the chief executive or principal chief of said nation to qualify or act, in his discretion, appoint a commissioner to fill the vacancy thus created.

11. Any person in rightful possession of any town lot having improvements thereon, other than temporary buildings, fencing, and tillage, shall have the right to purchase such lot by paying one-half of the appraised

value thereof, but if he shall fail within sixty days to purchase such lot and make the first payment thereon, as herein provided, the lot and improvements shall be sold at public auction to the highest bidder, under direction of the appraisement commission, at a price not less than their appraised value, and the purchaser shall pay the purchase price to the owner of the improvements, less the appraised value of the lot.

12. Any person having the right of occupancy of a residence or business lot, or both, in any town, whether improved or not, and owning no other lot or land therein, shall have the right to purchase such lot by paying one-half of the appraised value thereof.

13. Any person holding lands within a town occupied by him as a home, also any person who had at the time of signing this agreement purchased any lot, tract, or parcel of land from any person in legal possession at the time, shall have the right to purchase the lot embraced in same by paying one-half of the appraised value thereof, not, however, exceeding four acres.

14. All town lots not having thereon improvements, other than temporary buildings, fencing, and tillage, the sale or disposition of which is not herein otherwise specifically provided for, shall be sold within twelve months after their appraisement, under direction of the Secretary of the Interior, after due advertisement, at public auction to the highest bidder at not less than their appraised value.

Any person having the right of occupancy of lands in any town which has been or may be laid out into town lots, to be sold at public auction as above, shall have the right to purchase one-fourth of all the lots into which such lands may have been divided at two-thirds of their appraised value.

15. When the appraisement of any town lot is made, upon which any person has improvements as aforesaid, said appraisement commission shall notify him of the amount of said appraisement, and he shall, within sixty days thereafter, make payment of ten per centum of the amount due for the lot, as herein provided, and four months thereafter he shall pay fifteen per centum additional and the remainder of the purchase money in three equal annual installments, without interest.

Any person who may purchase an unimproved lot shall proceed to make payment for same in such time and manner as herein provided for the payment of sums due on improved lots, and if in any case any amount be not paid when due, it shall thereafter bear interest at the rate of ten per centum per annum until paid. The purchaser may in any case at any time make full payment for any town lot.

16. All town lots purchased by citizens in accordance with the provisions of this agreement shall be free from incumbrance by any debt contracted prior to date of his deed therefor, except for improvements thereon.

17. No taxes shall be assessed by any town government against any town lot remaining unsold, but taxes may be assessed against any town lot sold as herein provided, and the same shall constitute a lien upon the interest of the purchaser therein after any payment thereon has been made by him, and if forfeiture of any lot be made all taxes assessed against such lot shall be paid out of any money paid thereon by the purchaser.

18. The surveyors may select and locate a cemetery within suitable distance from each town, to embrace such number of acres as may be deemed necessary for such purpose, and the appraisement commission shall

appraise the same at not less than twenty dollars per acre, and the town may purchase the land by paying the appraised value thereof; and if any citizen have improvements thereon, other than fencing and tillage, they shall be appraised by said commission and paid for by the town. The town authorities shall dispose of the lots in such cemetery at reasonable prices, in suitable sizes for burial purposes, and the proceeds thereof shall be applied to the general improvement of the property.

19. The United States may purchase, in any town in the Creek Nation, suitable land for court-houses, jails, and other necessary public buildings for its use, by paying the appraised value thereof, the same to be selected under the direction of the department for whose use such buildings are to be erected; and if any person have improvements thereon, other than temporary buildings, fencing, and tillage, the same shall be appraised and paid for by the United States.

20. Henry Kendall College, Nazareth Institute, and Spaulding Institute, in Muskogee, may purchase the parcels of land occupied by them, or which may have been laid out for their use and so designated upon the plat of said town, at one-half of their appraised value, upon conditions herein provided; and all other schools and institutions of learning located in incorporated towns in the Creek Nation may, in like manner, purchase the lots or parcels of land occupied by them.

21. All town lots or parts of lots, not exceeding fifty by one hundred and fifty feet in size, upon which church houses and parsonages have been erected, and which are occupied as such at the time of appraisement, shall be properly conveyed to the churches to which such improvements belong gratuitously, and if such churches have other adjoining lots inclosed, actually necessary

for their use, they may purchase the same by paying one-half the appraised value thereof.

22. The towns of Clarksville, Coweta, Gibson Station, and Mounds may be surveyed and laid out in town lots and necessary streets and alleys and platted as other towns, each to embrace such amount of land as may be deemed necessary, not exceeding one hundred and sixty acres for either, and in manner not to include or interfere with the allotment of any citizen selected prior to the date of this agreement, which survey may be made in manner provided for other towns; and the appraisement of the town lots of said towns may be made by any committee appointed for either of the other towns hereinbefore named, and the lots in said towns may be disposed of in like manner and on the same conditions and terms as those of other towns. All of such work may be done under the direction of and subject to the approval of the Secretary of the Interior.

TITLES.

23. Immediately after the ratification of this agreement by Congress and the tribe the Secretary of the Interior shall furnish the principal chief with blank deeds necessary for all conveyances herein provided for, and the principal chief shall thereupon proceed to execute in due form and deliver to each citizen who has selected or may hereafter select his allotment, which is not contested, a deed conveying to him all right, title, and interest of the Creek Nation and of all other citizens in and to the lands embraced in his allotment certificate, and such other lands as may have been selected by him for equalization of his allotment.

The principal chief shall, in like manner and with like effect, execute and deliver to proper parties deeds of conveyance in all other cases herein provided for. All

lands or town lots to be conveyed to any one person shall, so far as practicable, be included in one deed, and all deeds shall be executed free of charge.

All conveyances shall be approved by the Secretary of the Interior, which shall serve as a relinquishment to the grantee of all the right, title, and interest of the United States in and to the lands embraced in his deed.

Any allottee accepting such deed shall be deemed to assent to the allotment and conveyance of all the lands of the tribe, as provided herein, and as a relinquishment of all his right, title, and interest in and to the same, except in the proceeds of lands reserved from allotment.

The acceptance of deeds of minors and incompetents by persons authorized to select their allotments for them, shall be deemed sufficient to bind such minors and incompetents to allotment and conveyance of all other lands of the tribe, as provided herein.

The transfer of the title of the Creek tribe to individual allottees and to other persons, as provided in this agreement, shall not inure to the benefit of any railroad company, nor vest in any railroad company any right, title, or interest in or to any of the lands in the Creek Nation.

All deeds when so executed and approved shall be filed in the office of the Dawes Commission, and there recorded without expense to the grantee, and such records shall have like effect as other public records.

RESERVATIONS.

24. The following lands shall be reserved from the general allotment herein provided for:

(a) All lands herein set apart for town sites.

(b) All lands to which, at the date of the ratification

of this agreement, any railroad company may, under any treaty or act of Congress, have a vested right for right of way, depots, station grounds, water stations, stock yards or similar uses connected with the maintenance and operation of the railroad.

(c) Forty acres for the Eufala High School.

(d) Forty acres for the Wealaka Boarding School.

(e) Forty acres for the Newyaka Boarding School.

(f) Forty acres for the Wetumka Boarding School.

(g) Forty acres for the Euchee Boarding School.

(h) Forty acres for the Coweta Boarding School.

(i) Forty acres for the Creek Orphan Home.

(j) Forty acres for the Tallahassee Colored Boarding School.

(k) Forty acres for the Pecan Creek Colored Boarding School.

(l) Forty acres for the Colored Creek Orphan Home.

(m) All lands selected for town cemeteries, as herein provided.

(n) The lands occupied by the university established by the American Baptist Home Mission Society, and located near the town of Muskogee, to the amount of forty acres, which shall be appraised, excluding improvements thereon, and said university shall have the right to purchase the same by paying one-half the appraised value thereof, on terms and conditions herein provided. All improvements made by said university on lands in excess of said forty acres shall be appraised and the value thereof paid to it by the person to whom such lands may be allotted.

(o) One acre each for the six established Creek courthouses, with the improvements thereon.

(p) One acre each for all churches and schools outside of towns now regularly used as such.

All reservations under the provisions of this agreement, except as otherwise provided herein, when not

needed for the purposes for which they are at present used, shall be sold at public auction to the highest bidder, to citizens only, under directions of the Secretary of the Interior.

MUNICIPAL CORPORATIONS.

25. Authority is hereby conferred upon municipal corporations in the Creek Nation, with the approval of the Secretary of the Interior, to issue bonds and borrow money thereon for sanitary purposes, and for the construction of sewers, lighting plants, waterworks, and schoolhouses, subject to all the provisions of laws of the United States in force in the organized Territories of the United States in reference to municipal indebtedness and issuance of bonds for public purposes; and said provisions of law are hereby put in force in said nation and made applicable to the cities and towns therein the same as if specially enacted in reference thereto.

CLAIMS.

26. All claims of whatsoever nature, including the "Loyal Creek claim" under article four of the treaty of eighteen hundred and sixty-six, and the "Self-emigration claim" under article twelve of the treaty of eighteen hundred and thirty-two, which the tribe or any individual thereof may have against the United States, or any other claim arising under the treaty of eighteen hundred and sixty-six, or any claim which the United States may have against said tribe, shall be submitted to the Senate of the United States for determination; and within two years from the ratification of this agreement the Senate shall make final determination thereof; and in the event that any sums are awarded the said tribe, or any citizen thereof, provision shall be made for immediate payment of same.

Of these claims the "Loyal Creek claim," for what they suffered because of their loyalty to the United States government during the civil war, long delayed, is so urgent in its character that the parties to this agreement express the hope that it may receive consideration and be determined at the earliest practicable moment.

Any other claim which the Creek Nation may have against the United States may be prosecuted in the Court of Claims of the United States, with right of appeal to the Supreme Court; and jurisdiction to try and determine such claim is hereby conferred upon said courts.

FUNDS OF THE TRIBE.

27. All treaty funds of the tribe shall hereafter be capitalized for the purpose of equalizing allotments and for other purposes provided in this agreement.

ROLLS OF CITIZENSHIP.

28. No person, except as herein provided, shall be added to the rolls of citizenship of said tribe after the date of this agreement, and no person whomsoever shall be added to said rolls after the ratification of this agreement.

All citizens who were living on the first day of April, eighteen hundred and ninety-nine, entitled to be enrolled under section twenty-one of the act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, entitled "An act for the protection of the people of the Indian Territory, and for other purposes," shall be placed upon the rolls to be made by said Commission under said act of Congress, and if any such citizen has died since that time, or may hereafter die, before receiving his allotment of lands and distributive

share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly.

All children born to citizens so entitled to enrollment, up to and including the first day of July, nineteen hundred, and then living, shall be placed on the rolls made by said Commission; and if any such child die after said date, the lands and moneys to which it would be entitled, if living, shall descend to its heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly.

The rolls so made by said Commission, when approved by the Secretary of the Interior, shall be the final rolls of citizenship of said tribe, upon which the allotment of all lands and the distribution of all moneys and other property of the tribe shall be made, and to no other persons.

29. Said Commission shall have authority to enroll as Creek citizens certain full-blood Creek Indians now residing in the Cherokee Nation, and also certain full-blood Creek Indians now residing in the Creek Nation who have recently removed there from the State of Texas, and families of full-blood Creeks who now reside in Texas, and such other recognized citizens found on the Creek rolls as might, by reason of nonresidence, be excluded from enrollment by section twenty-one of said act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight: *Provided*, That such nonresidents shall, in good faith, remove to the Creek Nation before said Commission shall complete the rolls of Creek citizens as aforesaid.

MISCELLANEOUS.

30. All deferred payments, under provisions of this agreement, shall constitute a lien in favor of the tribe on the property for which the debt was contracted, and if at the expiration of two years from the date of payment of the fifteen per centum aforesaid default in any annual payment has been made the lien for the payment of all purchase money remaining unpaid may be enforced in the United States court within the jurisdiction of which the town is located in the same manner as vendor's liens are enforced; such suit being brought in the name of the principal chief, for the benefit of the tribe.

31. All moneys to be paid to the tribe under any of the provisions of this agreement shall be paid, under the direction of the Secretary of the Interior, into the Treasury of the United States to the credit of the tribe, and an itemized report thereof shall be made monthly to the Secretary of the Interior and to the principal chief.

32. All funds of the tribe, and all moneys accruing under the provisions of this agreement, when needed for the purposes of equalizing allotments or for any other purposes herein prescribed, shall be paid out under the direction of the Secretary of the Interior and when required for per capita payments, if any, shall be paid out directly to each individual by a bonded officer of the United States, under direction of the Secretary of the Interior, without unnecessary delay.

33. No funds belonging to said tribe shall hereafter be used or paid out for any purposes by any officer of the United States without consent of the tribe, expressly given through its national council, except as herein provided.

34. The United States shall pay all expenses incident to the survey, platting, and disposition of town

lots, and of allotments of lands made under the provisions of this agreement, except where the town authorities have been or may be duly authorized to survey and plat their respective towns at the expense of such town.

35. Parents shall be the natural guardians of their children, and shall act for them as such unless a guardian shall have been appointed by a court having jurisdiction; and parents so acting shall not be required to give bond as guardians unless by order of such court, but they, and all other persons having charge of lands, moneys, and other property belonging to minors and incompetents, shall be required to make proper accounting therefor in the court having jurisdiction thereof in manner deemed necessary for the preservation of such estates.

36. All Seminole citizens who have heretofore settled and made homes upon lands belonging to the Creeks may there take, for themselves and their families, such allotments as they would be entitled to take of Seminole lands, and all Creek citizens who have heretofore settled and made homes upon lands belonging to Seminoles, may there take, for themselves and their families, allotments of one hundred and sixty acres each; and if the citizens of one tribe thus receive a greater number of acres than the citizens of the other, the excess shall be paid for by such tribe, at a price to be agreed upon by the principal chiefs of the two tribes, and if they fail to agree, the price shall be fixed by the Indian agent; but the citizenship of persons so taking allotments shall in no wise be affected thereby.

Titles shall be conveyed to Seminoles selecting allotments of Creek lands in manner herein provided for conveyance of Creek allotments, and titles shall be con-

veyed to Creeks selecting allotments of Seminole lands in manner provided in the Seminole agreement dated December sixteenth, eighteen hundred and ninety-seven, for conveyance of Seminole allotments: *Provided*, That deeds shall be executed to allottees immediately after selection of allotment is made.

This provision shall not take effect until after it shall have been separately and specifically approved by the Creek national council, and by the Seminole general council; and if not approved by either, it shall fail altogether, and be eliminated from this agreement without impairing any other of its provisions.

37. Creek citizens may rent their allotments, when selected, for a term of not exceding one year, and after receiving title thereto without restriction, if adjoining allottees are not injured thereby, and cattle grazed thereon shall not be liable to any tribal tax; but when cattle are introduced into the Creek Nation and grazed on lands not selected by citizens, the Secretary of the Interior is authorized to collect from the owners thereof a reasonable grazing tax for the benefit of the tribe; and section twenty-one hundred and seventeen, Revised Statutes of the United States, shall not hereafter apply to Creek lands.

38. After any citizen has selected his allotment he may dispose of any timber thereon, but if he dispose of such timber, or any part of same, he shall not thereafter select other lands in lieu thereof, and his allotment shall be appraised as if in condition when selected.

No timber shall be taken from lands not so selected and disposed of, without payment of reasonable royalty thereon, under contract to be prescribed by the Secretary of the Interior.

39. No noncitizen renting lands from a citizen for agricultural purposes, as provided by law, whether such lands have been selected as an allotment or not, shall be required to pay any permit tax.

40. The Creek school fund shall be used, under direction of the Secretary of the Interior, for the education of Creek citizens, and the Creek schools shall be conducted under rules and regulations prescribed by him, under direct supervision of the Creek school superintendent and a supervisor appointed by the Secretary, and under Creek laws, subject to such modifications as the Secretary of the Interior may deem necessary to make the schools most effective and to produce the best possible results.

All teachers shall be examined by or under direction of said superintendent and supervisor, and competent teachers and other persons to be engaged in and about the schools with good moral character only shall be employed, but where all qualifications are equal preference shall be given to citizens in such employment.

All moneys for running the schools shall be appropriated by the Creek national council, not exceeding the amount of the Creek school fund, seventy-six thousand four hundred and sixty-eight dollars and forty cents; but if it fail or refuse to make the necessary appropriations the Secretary of the Interior may direct the use of a sufficient amount of the school funds to pay all expenses necessary to the efficient conduct of the schools, strict account thereof to be rendered to him and to the principal chief.

All accounts for expenditures in running the schools shall be examined and approved by said superintendent and supervisor, and also by the general superintendent

of Indian schools in Indian Territory, before payment thereof is made.

If the superintendent and supervisor fail to agree upon any matter under their direction or control, it shall be decided by said general superintendent, subject to appeal to the Secretary of the Interior; but his decision shall govern until reversed by the Secretary.

41. The provisions of section thirteen of the act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, entitled "An act for the protection of the people of the Indian Territory, and for other purposes," shall not apply to or in any manner affect the lands or other property of said tribe, or be in force in the Creek Nation, and no act of Congress or treaty provision inconsistent with this agreement shall be in force in said nation, except section fourteen of said last-mentioned act, which shall continue in force as if this agreement had not been made.

42. No act, ordinance, or resolution of the national council of the Creek Nation in any manner affecting the lands of the tribe, or of individuals after allotment, or the moneys or other property of the tribe, or of the citizens thereof, except appropriations for the necessary incidental and salaried expenses of the Creek government as herein limited, shall be of any validity until approved by the President of the United States. When any such act, ordinance, or resolution shall be passed by said council and approved by the principal chief, a true and correct copy thereof, duly certified, shall be immediately transmitted to the President, who shall, within thirty days after received by him, approve or disapprove the same. If disapproved, it shall be so indorsed and returned to the principal chief; if approved, the approval shall be indorsed thereon, and it shall be

published in at least two newspapers having a bona fide circulation in the Creek Nation.

43. The United States agrees to maintain strict laws in said nation against the introduction, sale, barter, or giving away of liquors or intoxicants of any kind whatsoever.

44. This agreement shall in no wise affect the provisions of existing treaties between the United States and said tribe except so far as inconsistent therewith.

45. All things necessary to carrying into effect the provisions of this agreement, not otherwise herein specifically provided for, shall be done under authority and direction of the Secretary of the Interior.

46. The tribal government of the Creek Nation shall not continue longer than March fourth, nineteen hundred and six, subject to such further legislation as Congress may deem proper.

47. Nothing contained in this agreement shall be construed to revive or re-establish the Creek courts, which have been abolished by former acts of Congress.

Approved, March 1, 1901.

[Appropriation act of May 27, 1902 (32 Stat. L., 245).]

For salaries of four commissioners appointed under acts of Congress, approved March third, eighteen hundred and ninety-three, and March second, eighteen hundred and ninety-five, to negotiate with the Five Civilized Tribes in the Indian Territory, twenty thousand dollars: *Provided*, That said Commission shall exercise all the powers heretofore conferred upon it by Congress: *Provided further*, That all children born to duly enrolled and recognized citizens of the Creek Nation up to and including the twenty-fifth day of May, nineteen hundred and one, and then living, shall be added to the rolls of citizenship of said nation made under the provision of an act entitled "An act to ratify and confirm an agreement with the Muskogee or Creek tribe of Indians, and for other purposes," approved March first, nineteen hundred and one, and if any such child has died since the twenty-fifth day of May, nineteen hundred and one, or may hereafter die, before receiving his allotment of land and distributive share of the funds of the tribe, the lands and moneys to which he would be entitled if living shall descend to his heirs and be allotted and distributed to them accordingly: *And provided further*, That the act entitled "An act to ratify and confirm an agreement with the Muskogee or Creek tribe of Indians, and for other purposes," approved March first, nineteen hundred and one, in so far as it provides for descent and distribution according to the laws of the Creek Nation, is hereby repealed, and the descent and distribution of lands and moneys provided for in said act shall be in accordance with the provisions of chapter forty-nine of Mansfield's Digest of the Statutes of Arkansas in force in Indian Territory.

For expenses of commissioners and necessary expenses of employees, and three dollars per diem for

expenses of a clerk detailed as special disbursing agent by the Interior Department while on duty with the Commission, shall be paid therefrom, for clerical help, including secretary of the Commission and interpreters (act of March third, nineteen hundred and one, volume thirty-one, page one thousand and seventy-four, section one), ninety-three thousand dollars; contingent expenses of the Commission (same act), two thousand dollars: *Provided further*, That this appropriation may be used by said Commission in the prosecution of all work to be done by or under its direction as required by law; and said commissioners shall at once make an itemized statement to the Secretary of the Interior of all their expenditures up to January first, nineteen hundred and one, and annually thereafter: *And provided further*, That not to exceed ten thousand four hundred dollars of the above amount may be used in the temporary employment in the office of the Commissioner of Indian Affairs of three clerks, at the rate of one thousand six hundred dollars per annum; one clerk, at the rate of one thousand four hundred dollars, and one clerk at the rate of one thousand two hundred dollars, who shall be competent to examine records in disputed citizenship cases and law contests growing out of the work of said Commission, and in the temporary employment in said office of three competent stenographers, at the rate of one thousand dollars each per annum.

To pay all expenses incident to the survey, platting, and appraisement of town sites in the Choctaw, Chickasaw, Creek, and Cherokee nations, Indian Territory, as required by sections fifteen and twenty-nine of an act entitled "An act for the protection of the people of the Indian Territory, and for other purposes," approved June twenty-eighth, eighteen hundred and ninety-eight,

and all acts amendatory thereof or supplemental thereto, fifty thousand dollars: *Provided*, That hereafter the Secretary of the Interior may, whenever the chief executive of the Choctaw or Chickasaw nations fails or refuses to appoint a town-site commissioner for any town, or to fill any vacancy caused by the neglect or refusal of the town-site commissioner appointed by the chief executive of the Choctaw or Chickasaw nations to qualify or act, in his discretion, appoint a commissioner to fill the vacancy thus created: *Provided further*, That the limits of such towns in the Cherokee, Choctaw, and Chickasaw nations having a population of less than two hundred people, as in the judgment of the Secretary of the Interior should be established, shall be defined as early as practicable by the Secretary of the Interior in the same manner as provided for towns having over two hundred people under existing law, and the same shall not be subject to allotment. That the land so segregated and reserved from allotment shall be disposed of, in such manner as the Secretary of the Interior may direct, by a town-site commission, one member to be appointed by the Secretary of the Interior and one by the executive of the nation in which such land is located; proceeds arising from the disposition of such lands to be applied in like manner as the proceeds of other lands in town sites.

For the purpose of removing intruders and placing allottees in unrestricted possession of their allotments, to be expended under the direction of the Secretary of the Interior and to be immediately available, fifteen thousand dollars; in all, one hundred and sixty thousand dollars: *Provided, however*, That it shall hereafter be unlawful to remove or deport any person from the Indian Territory who is in lawful possession of any lots or parcels of land in any town or city in the Indian

Territory which has been designated as a town site under existing laws and treaties, and no part of this appropriation shall be used for the deportation or removal of any such person from the Indian Territory: *Provided*, That the just and reasonable share of each member of the Chickasaw, Choctaw, Creek, and Cherokee nations of Indians, in the lands belonging to the said tribes, which each member is entitled to hold in his possession until allotments are made, as provided in the act entitled "An act for the protection of the people of the Indian Territory, and for other purposes," approved June twenty-eighth, eighteen hundred and ninety-eight, be, and the same is hereby, declared to be three hundred and twenty acres for each member of the Chickasaw Nation, three hundred and twenty acres for each member of the Choctaw Nation, one hundred and sixty acres for each member of the Creek Nation, and one hundred acres for each member of the Cherokee Nation.

[Supplemental Creek agreement (32 Stat. L., 500).]

AN ACT To ratify and confirm a supplemental agreement with the Creek tribe of Indians, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following supplemental agreement, submitted by certain commissioners of the Creek tribe of Indians, as herein amended, is hereby ratified and confirmed on the part of the United States, and the same shall be of full force and effect if ratified by the Creek tribal council on or before the first day of September, nineteen hundred and two, which said supplemental agreement is as follows:

This agreement by and between the United States, entered into in its behalf by the Commission to the Five Civilized Tribes, Henry L. Dawes, Tams Bixby, Thomas B. Needles, and Clifton R. Breckenridge, duly appointed and authorized thereunto, and the Muskogee (or Creek) tribe of Indians, in Indian Territory, entered into in behalf of the said tribe by Pleasant Porter, principal chief, Roley McIntosh, Thomas W. Perryman, Amos McIntosh, and David M. Hodge, commissioners duly appointed and authorized thereunto, witnesseth, that in consideration of the mutual undertakings herein contained, it is agreed as follows:

DEFINITIONS.

The words "Creek" and "Muskogee" as used in this agreement shall be deemed synonymous, and the words "nation" and "tribe" shall each be deemed to refer to the Muskogee Nation or Muskogee tribe of Indians in Indian Territory. The words "principal chief" shall be

deemed to refer to the principal chief of the Muskogee Nation. The words "citizen" or "citizens" shall be deemed to refer to a member or members of the Muskogee tribe or nation of Indians. The word "Commission" shall be deemed to refer to the United States Commission to the Five Civilized Tribes.

ALLOTMENT OF LANDS.

2. Section 2 of the agreement ratified by act of Congress approved March, 1901 (31 Stat. L., 861), is amended and as so amended is re-enacted to read as follows:

All lands belonging to the Creek tribe of Indians in Indian Territory, except town sites and lands reserved for Creek schools and churches, railroads, and town cemeteries, in accordance with the provisions of the act of Congress approved March 1, 1901 (31 Stat. L., 861), shall be appraised at not to exceed $6.50 per acre, excluding only lawful improvements on lands in actual cultivation.

Such appraisement shall be made, under the direction and supervision of the Commission to the Five Civilized Tribes, by such number of committees with necessary assistance as may be deemed necessary to expedite the work, one member of each committee to be appointed by the principal chief. Said Commission shall have authority to revise and adjust the work of said committees; and if the members of any committee fail to agree as to the value of any tract of land, the value thereof shall be fixed by said Commission. The appraisement so made shall be submitted to the Secretary of the Interior for approval.

3. Paragraph 2 of section 3 of the agreement ratified by said act of Congress approved March 1, 1901, is amended and as so amended is re-enacted to read as follows:

If any citizen select lands the appraised value of which is $6.50 per acre, he shall not receive any further distribution of property or funds of the tribe until all other citizens have received lands and moneys equal in value to his allotment.

4. Exclusive jurisdiction is hereby conferred upon the Commission to the Five Civilized Tribes to determine, under the direction of the Secretary of the Interior, all controversies arising between citizens as to their right to select certain tracts of land.

5. Where it is shown to the satisfaction of said Commission that it was the intention of a citizen to select lands which include his home and improvements, but that through error and mistake he had selected land which did not include said home and improvements, said Commission is authorized to cancel said selection and the certificate of selection or allotment embracing said lands, and permit said citizen to make a new selection including said home and improvements; and should said land including said home and improvements have been selected by any other citizen of said nation, the citizen owning said home and improvements shall be permitted to file, within ninety days from the ratification of this agreement, a contest against the citizen having previously selected the same, and shall not be prejudiced therein by reason of lapse of time or any provision of law or rules and regulations to the contrary.

DESCENT AND DISTRIBUTION.

6. The provisions of the act of Congress approved March 1, 1901 (31 Stat. L., 861), in so far as they provide for descent and distribution according to the laws of the Creek Nation, are hereby repealed, and the descent and distribution of land and money provided for by said act shall be in accordance with chapter 49 of

Mansfield's Digest of the Statutes of Arkansas now in force in Indian Territory: *Provided*, That only citizens of the Creek Nation, male and female, and their Creek descendants shall inherit lands of the Creek Nation: *And provided further*, That if there be no person of Creek citizenship to take the descent and distribution of said estate then the inheritance shall go to non-citizen heirs in the order named in said chapter 49.

ROLLS OF CITIZENSHIP.

7. All children born to those citizens who are entitled to enrollment, as provided by the act of Congress approved March 1, 1901 (31 Stat. L., 864), subsequent to July 1, 1900, and up to and including May 25, 1901, and living upon the latter date, shall be placed on the rolls made by said Commission. And if any such child has died since May 25, 1901, or may hereafter die before receiving his allotment of lands and distributive share of the funds of the tribe, the lands and moneys to which he would be entitled if living shall descend to his heirs as herein provided and be allotted and distributed to them accordingly.

8. All children who have not heretofore been listed for enrollment living May 25, 1901, born to citizens whose names appear upon the authenticated rolls of 1890 or upon the authenticated rolls of 1895, and entitled to enrollment as provided by the act of Congress approved March 1, 1901 (31 Stat. L., 861), shall be placed on the rolls made by said Commission. And if any such child has died since May 25, 1901, or may hereafter die before receiving his allotment of lands and distributive share of the funds of the tribe, the lands and moneys to which he would be entitled if living shall descend to his heirs as herein provided and be allotted and distributed to them accordingly.

9. If the rolls of citizenship provided for by the act of Congress approved March 1, 1901 (31 Stat. L., 861), shall have been completed by said Commission prior to the ratification of this agreement, the names of children entitled to enrollment under the provisions of sections 7 and 8 hereof shall be placed upon a supplemental role of citizens of the Creek Nation, and said supplemental roll, when approved by the Secretary of the Interior, shall in all respects be held to be a part of the final rolls of citizenship of said tribe: *Provided*, That the Dawes Commission be, and is hereby, authorized to add the following persons to the Creek roll: Nar-wal-le-pe-es, Mary Washington, Walter Washington, and Willie Washington, who are Creek Indians but whose names were left off the roll through neglect on their part.

ROADS.

10. Public highways or roads 3 rods in width, being one and one-half rods on each side of the section line, may be established along all section lines without any compensation being paid therefor; and all allottees, purchasers, and others shall take the title to such lands subject to this provision. And public highways or roads may be established elsewhere whenever necessary for the public good, the actual value of the land taken elsewhere than along section lands to be determined under the direction of the Secretary of the Interior while the tribal government continues, and to be paid by the Creek Nation during that time; and if buildings or other improvements are damaged in consequence of the establishment of such public highways or roads, whether along section lines or elsewhere, such damages, during the continuance of the tribal government, shall be determined and paid in the same manner.

11. In all instances of the establishment of town sites

in accordance with the provisions of the act of Congress approved May 31, 1900 (31 Stat. L., 231), or those of section 10 of the agreement ratified by act of Congress approved March 1, 1901 (31 Stat. L., 861), authorizing the Secretary of the Interior, upon the recommendation of the Commission to the Five Civilized Tribes, at any time before allotment, to set aside and reserve from allotment any lands in the Creek Nation, not exceeding 160 acres in any one tract, at such stations as are or shall be established in conformity with law on the line of any railroad which shall be constructed, or be in process of construction, in or through said nation prior to the allotment of lands therein, any citizen who shall have previously selected such town site, or any portion thereof, for his allotment, or who shall have been by reason of improvements therein entitled to select the same for his allotment, shall be paid by the Creek Nation the full value of his improvements thereon at the time of the establishment of the town site, under rules and regulations to be prescribed by the Secretary of the Interior: *Provided, however*, That such citizens may purchase any of said lands in accordance with the provisions of the act of March 1, 1901 (31 Stat. L., 61): *And provided further*, That the lands which may hereafter be set aside and reserved for town sites upon recommendation of the Dawes Commission as herein provided shall embrace such acreage as may be necessary for the present needs and reasonable prospective growth of such town sites, and not to exceed 640 acres for each town site, and 10 per cent of the net proceeds arising from the sale of that portion of the land within the town site so selected by him, or which he was so entitled to select; and this shall be in addition to his right to receive from other lands an allotment of 160 acres.

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CEMETERIES.

12. A cemetery other than a town cemetery included within the boundaries of an allotment shall not be desecrated by tillage or otherwise, but no interment shall be made therein except with the consent of the allottee, and any person desecrating by tillage or otherwise a grave or graves in a cemetery included within the boundaries of an allotment shall be guilty of a misdemeanor, and upon conviction be punished as provided in section 567 of Mansfield's Digest of the Statutes of Arkansas.

13. Whenever the town-site surveyors of any town in the Creek Nation shall have selected and located a cemetery as provided in section 18 of the act of Congress approved March 1, 1901 (31 Stat. L., 861), the town authorities shall not be authorized to dispose of lots in such cemetery until payment shall have been made to the Creek Nation for land used for said cemetery as provided in said act of Congress; and if the town authorities fail or refuse to make payment as aforesaid within one year of the approval of the plat of said cemetery by the Secretary of the Interior, the land so reserved shall revert to the Creek Nation and be subject to allotment. And for lands heretofore or hereafter designated as parks upon any plat or any town site, the town shall make payment into the Treasury of the United States to the credit of the Creek Nation within one year at the rate of $20 per acre; and if such payment be not made within that time, the lands so designated as a park shall be platted into lots and sold as other town lots.

MISCELLANEOUS.

14. All funds of the Creek Nation not needed for equalization of allotments, including the Creek school fund, shall be paid out, under direction of the Secre-

tary of the Interior, per capita to the citizens of the Creek Nation on the dissolution of the Creek tribal government.

15. The provisions of section 21 of the act of Congress approved March 1, 1901 (31 Stat. L., 861), for the reservation of land for the six established Creek courthouses is hereby repealed.

16. Lands allotted to citizens shall not in any manner whatever, or at any time, be encumbered, taken, or sold to secure or satisfy any debt or obligation nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior. Each citizen shall select from his allotment forty acres of land, or a quarter of a quarter section, as a homestead, which shall be and remain nontaxable, inalienable, and free from any incumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear.

Selections of homesteads for minors, prisoners, convicts, incompetents, and aged and infirm persons, who can not select for themselves, may be made in the manner provided for the selection of their allotments, and if for any reason such selection be not made for any citizen it shall be the duty of said Commission to make selection for him. The homestead of each citizen shall remain, after the death of the allottee, for the use and support of children born to him after May 25, 1901, but if he have no such issue then he may dispose of his homestead by will, free from the limitation herein imposed, and if this be not done the land embraced in his homestead shall descend to his heirs, free from such

limitation, according to the laws of descent herein otherwise prescribed. Any agreement or conveyance of any kind or character violative of any of the provisions of this paragraph shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity.

17. Section 37 of the agreement ratified by said act of March 1, 1901, is amended, and as so amended is reenacted to read as follows:

Creek citizens may rent their allotments, for strictly nonmineral purposes, for a term not to exceed one year for grazing purposes only and for a period not to exceed five years for agricultural purposes, but without any stipulation or obligation to renew the same. Such leases for a period longer than one year for grazing purposes and for a period longer than five years for agricultural purposes, and leases for mineral purposes may also be made with the approval of the Secretary of the Interior, and not otherwise. Any agreement or lease of any kind or character violative of this paragraph shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity. Cattle grazed upon leased allotments shall not be liable to any tribal tax, but when cattle are introduced into the Creek Nation and grazed on lands not selected for allotment by citizens, the Secretary of the Interior shall collect from the owners thereof a reasonable grazing tax for the benefit of the tribe, and section 2117 of the Revised Statutes of the United States shall not hereafter apply to Creek lands.

18. When cattle are introduced into the Creek Nation to be grazed upon either lands not selected for allotment or upon lands allotted or selected for allotment the owner thereof, or the party or parties so introducing

the same, shall first obtain a permit from the United States Indian agent, Union Agency, authorizing the introduction of such cattle. The application for said permit shall state the number of cattle to be introduced, together with a description of the same, and shall specify the lands upon which said cattle are to be grazed, and whether or not said lands have been selected for allotment. Cattle so introduced and all other live stock owned or controlled by noncitizens of the nation shall be kept upon the inclosed lands, and if any such cattle or other live stock trespass upon lands allotted to or selected for allotment by any citizen of said nation, the owner thereof shall, for the first trespass, make reparation to the party injured for the true value of the damages he may have sustained, and for every trespass thereafter double damages, to be recovered with costs, whether the land upon which trespass is made is inclosed or not.

Any person who shall introduce any cattle into the Creek Nation in violation of the provisions of this section shall be deemed guilty of a misdemeanor and punished by a fine of not less than $100, and shall stand committed until such fine and costs are paid, such commitment not to exceed one day for every $2 of said fine and costs; and every day said cattle are permitted to remain in said nation without a permit for their introduction having been obtained shall constitute a separate offense.

19. Section 8 of the agreement ratified by said act of March 1, 1901, is amended, and as so amended is reenacted to read as follows:

The Secretary of the Interior shall, through the United States Indian agent in said Territory, immediately after the ratification of this agreement, put each citizen who

has made selection of his allotment in unrestricted possession of his land and remove therefrom all persons objectionable to him; and when any citizen shall thereafter make selection of his allotment as herein provided and receive certificate therefor, he shall be immediately thereupon so placed in possession of his land, and during the continuance of the tribal government the Secretary of the Interior, through such Indian agent, shall protect the allottee in his right to possession against any and all persons claiming under any lease, agreement, or conveyance not obtained in conformity to law.

20. This agreement is intended to modify and supplement the agreement ratified by said act of Congress approved March 1, 1901, and shall be held to repeal any provision in that agreement or in any prior agreement, treaty, or law in conflict herewith.

21. This agreement shall be binding upon the United States and the Creek Nation and upon all persons affected thereby when it shall have been ratified by Congress and the Creek national council, and the fact of such ratification shall have been proclaimed as hereinafter provided.

22. The principal chief, as soon as practicable after the ratification of this agreement by Congress, shall call an extra session of the Creek Nation council and submit this agreement, as ratified by Congress, to such council for its consideration, and if the agreement be ratified by the national council, as provided in the constitution of the tribe, the principal chief shall transmit to the President of the United States a certified copy of the act of the council ratifying the agreement, and thereupon the President shall issue his proclamation making public announcement of such ratification. Thenceforward all the provisions of this agreement shall have the force and effect of law.

Approved, June 30, 1902.

[Choctaw and Chickasaw agreement (32 Stat. L., 641).]

AN ACT To ratify and confirm an agreement with the Choctaw and Chickasaw tribes of Indians, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following agreement, made by the Commission to the Five Civilized Tribes with the commissions representing the Choctaw and Chickasaw tribes of Indians on the twenty-first day of March, nineteen hundred and two, be, and the same is hereby, ratified and confirmed, to-wit:

AGREEMENT BETWEEN THE UNITED STATES AND THE CHOCTAWS AND CHICKASAWS.

This agreement, by and between the United States, entered into in its behalf by Henry L. Dawes, Tams Bixby, Thomas B. Needles, and Clifton R. Breckinridge, commissioners duly appointed and authorized thereunto, and the Choctaw and Chickasaw tribes of Indians in Indian Territory, respectively, entered into in behalf of such Choctaw and Chickasaw tribes by Gilbert W. Dukes, Green McCurtain, Thomas E. Sanguin, and Simon E. Lewis in behalf of the Choctaw tribe of Indians; and Douglas H. Johnston, Calvin J. Grant, Holmes Willis, Edward R. Johnson, and Benjamin H. Colbert in behalf of the Chickasaw tribe of Indians, commissioners duly appointed and authorized thereunto—

Witnesseth that, in consideration of the mutual undertakings herein contained, it is agreed as follows:

DEFINITIONS.

1. Wherever used in this agreement the words "nations" and "tribes" shall each be held to mean the Choc-

taw and Chickasaw nations or tribes of Indians in Indian Territory.

2. The words "chief executives" shall be held to mean the principal chief of the Choctaw Nation and the governor of the Chickasaw Nation.

3. The words "member" or "members" and "citizen" or "citizens" shall be held to mean members or citizens of the Choctaw or Chickasaw tribe of Indians in Indian Territory, not including freedmen.

4. The term "Atoka agreement" shall be held to mean the agreement made by the Commission to the Five Civilized Tribes with the Commissioners representing the Choctaw and Chickasaw tribes of Indians at Atoka, Indian Territory, and embodied in the act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight. (30 Stats., 495.)

5. The word "minor" shall be held to mean males under the age of twenty-one years and females under the age of eighteen years.

6 The word 'select" and its various modifications, as applied to allotments and homesteads, shall be held to mean the formal application at the land office, to be established by the Commission to the Five Civilized Tribes for the Choctaw and Chickasaw nations, for particular tracts of land.

7. Every word in this agreement importing the masculine gender may extend and be applied to females as well as males, and the use of the plural may include also the singular, and vice versa.

8. The terms "allottable lands" or "lands allottable" shall be deemed to mean all the lands of the Choctaw and Chickasaw tribes not herein reserved from allotment.

APPRAISEMENT OF LANDS.

9. All lands belonging to the Choctaw and Chickasaw tribes in the Indian Territory, except such as are herein reserved from allotment, shall be appraised at their true value: *Provided*, That in determining such value consideration shall not be given to the location thereof, to any mineral deposits, or to any timber except such pin timber as may have been heretofore estimated by the Commission to the Five Civilized Tribes, and without reference to improvements which may be located thereon.

10. The appraisement as herein provided shall be made by the Commission to the Five Civilized Tribes, and the Choctaw and Chickasaw tribes shall each have a representative, to be appointed by the respective executives, to co-operate with the said Commission.

ALLOTMENT OF LANDS.

11. There shall be allotted to each member of the Choctaw and Chickasaw tribes as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to three hundred and twenty acres of the average allottable land of the Choctaw and Chickasaw nations, and to each Choctaw and Chickasaw freedman, as soon as practicable after the approval by the Secretary of the Interior of his enrollment, land equal in value to forty acres of the average allottable land of the Choctaw and Chickasaw nations; to conform, as nearly as may be, to the areas and boundaries established by the government survey, which land may be selected by each allottee so as to include his improvements. For the purpose of making allotments and designating homesteads hereunder, the forty-acre or quarter-quarter subdivisions established by the government survey may be dealt with

as if further subdivided into four equal parts in the usual manner, thus making the smallest legal subdivision ten acres, or a quarter of a quarter of a quarter of a section.

12. Each member of said tribes shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to one hundred and sixty acres of the average allottable land of the Choctaw and Chickasaw nations, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment, and separate certificate and patent shall issue for said homestead.

13. The allotment of each Choctaw and Chickasaw freedman shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment.

14. When allotments as herein provided have been made to all citizens and freedmen, the residue of lands not herein reserved or otherwise disposed of, if any there be, shall be sold at public auction under rules and regulations and on terms to be prescribed by the Secretary of the Interior, and so much of the proceeds as may be necessary for equalizing allotments shall be used for that purpose, and the balance shall be paid into the Treasury of the United States to the credit of the Choctaws and Chickasaws and distributed per capita as other funds of the tribes.

15. Lands allotted to members and freedmen shall not be affected or encumbered by any deed, debt, or obligation of any character contracted prior to the time at which said land may be alienated under this act, nor shall said lands be sold except as herein provided.

16. All lands allotted to the members of said tribes,

except such land as is set aside to each for a homestead as herein provided, shall be alienable after issuance of patent as follows: One-fourth in acreage in one year, one-fourth in acreage in three years, and the balance in five years; in each case from date of patent: *Provided*, That such land shall not be alienable by the allottee or his heirs at any time before the expiration of the Choctaw and Chickasaw tribal governments for less than its appraised value.

17. If for any reason an allotment should not be selected or a homestead designated by, or on behalf of, any member or freedman, it shall be the duty of said Commission to make said selection and designation.

18. In the making of allotments and in the designation of homesteads for members of said tribes, under the provisions of this agreement, said Commission shall not be required to divide lands into tracts of less than the smallest legal subdivision provided for in paragraph eleven hereof.

19. It shall be unlawful after ninety days after the date of the final ratification of this agreement for any member of the Choctaw or Chickasaw tribes to enclose or hold possession of in any manner, by himself or through another, directly or indirectly, more lands in value than that of three hundred and twenty acres of average allottable lands of the Choctaw and Chickasaw nations, as provided by the terms of this agreement, either for himself or for his wife, or for each of his minor children, if members of said tribes; and any member of said tribes found in such possession of lands, or having the same in any manner enclosed after the expiration of ninety days after the date of the final ratification of this agreement, shall be deemed guilty of a misdemeanor.

20. It shall be unlawful after ninety days after the date of the final ratification of this agreement for any Choctaw or Chickasaw freedman to enclose or hold possession of in any manner, by himself or through another, directly or indirectly, more than so much land as shall be equal in value to forty acres of the average allottable lands of the Choctaw and Chickasaw tribes as provided by the terms of this agreement, either for himself or for his wife, or for each of his minor children, if they be Choctaw or Chickasaw freedmen; and any freedman found in such possession of lands, or having the same in any manner enclosed after the expiration of ninety days after the date of the final ratification of this agreement, shall be deemed guilty of a misdemeanor.

21. Any person convicted of violating any of the provisions of sections 19 and 20 of this agreement shall be punished by a fine not less than one hundred dollars, and shall stand committed until such fine and costs are paid (such commitment not to exceed one day for every two dollars of said fine and costs), and shall forfeit possession of any property in question, and each day on which such offense is committed or continues to exist shall be deemed a separate offense. And the United States district attorneys for the districts in which said nations are situated are required to see that the provisions of said sections are strictly enforced, and they shall immediately after the expiration of ninety days after the date of the final ratification of this agreement proceed to dispossess all persons of such excessive holdings of lands, and to prosecute them for so unlawfully holding the same. And the Commission to the Five Civilized Tribes shall have authority to make investigation of all violations of sections 19 and 20 of this agreement, and make report thereon to the United States district attorneys.

22. If any person whose name appears upon the rolls, prepared as herein provided, shall have died subsequent to the ratification of this agreement and before receiving his allotment of land, the lands to which such person would have been entitled if living shall be allotted in his name, and shall, together with his proportionate share of other tribal property, descend to his heirs according to the laws of descent and distribution as provided in chapter forty-nine of Mansfield's Digest of the Statutes of Arkansas: *Provided*, That the allotment thus to be made shall be selected by a duly appointed administrator or executor. If, however, such administrator or executor be not duly and expeditiously appointed, or fails to act promptly when appointed, or for any other cause such selection be not so made within a reasonable and practicable time, the Commission to the Five Civilized Tribes shall designate the lands thus to be allotted.

23. Allotment certificates issued by the Commission to the Five Civilized Tribes shall be conclusive evidence of the right of any allottee to the tract of land described therein; and the United States Indian agent at the Union Agency shall, upon the application of the allottee, place him in possession of his allotment, and shall remove therefrom all persons objectionable to such allottee, and the acts of the Indian agent hereunder shall not be controlled by the writ or process of any court.

24. Exclusive jurisdiction is hereby conferred upon the Commission to the Five Civilized Tribes to determine, under the direction of the Secretary of the Interior, all matters relating to the allotment of land.

EXCESSIVE HOLDINGS.

25. After the opening of a land office for allotment purposes in both the Choctaw and the Chickasaw na-

tions any citizen or freedman of either of said nations may appear before the Commission to the Five Civilized Tribes at the land office in the nation in which his land is located and make application for his allotment and for allotments, including homesteads, and after the expiration of ninety days following the opening of such land offices any such applicant may make allegation that the land or any part of the land that he desires to have allotted is held by another citizen or person in excess of the amount of land to which said citizen or person is lawfully entitled, and that he desires to have said land allotted to him or members of his family as herein provided; and thereupon said Commission shall serve notice upon the person so alleged to be holding land in excess of the lawful amount to which he may be entitled, said notice to set forth the facts alleged and the name and post-office address of the person alleging the same, and the rights and consequences herein provided, and the person so alleged to be holding land contrary to law shall be allowed thirty days from the date of the service of said notice in which to appear at one of the said land offices and to select his allotment and the allotments he may be lawfully authorized to select, including homesteads; and if at the end of the thirty days last provided for the person upon whom said notice has been served has not selected his allotment and allotments as provided, then the Commission to the Five Civilized Tribes shall immediately make or reserve said allotments for the person or persons who have failed to act in accordance with the notice aforesaid, having due regard for the best interest of said allottees; and after such allotmens have been made or reserved by said Commission, then all other lands held or claimed, or previously held or claimed by said person or persons, shall be deemed a part of the public domain of the Choctaw and Chickasaw nations and be subject

to disposition as such: *Provided*, That any persons who have previously applied for any part of said lands shall have a prior right of allotment of the same in the order of their applications and as their lawful rights may appear.

If any citizen or freedman of the Choctaw and Chickasaw nations shall not have selected his allotment within twelve months after the date of the opening of said land offices in said nations, if not herein otherwise provided, and provided that twelve months shall have elapsed from the date of the approval of his enrollment by the Secretary of the Interior, then the Commission to the Five Civilized Tribes may immediately proceed to select an allotment, including a homestead for such person, said allotment and homestead to be selected as the Commission may deem for the best interest of said person, and the same shall be of the same force and effect as if such selection had been made by such citizen or freedman in person, and all lands held or claimed by persons for whom allotments have been selected by the Commission as provided, and in excess of the amount included in said allotments, shall be a part of the public domain of the Choctaw and Chickasaw nations and be subject to disposition as such.

RESERVATIONS.

26. The following lands shall be reserved from the allotment of lands herein provided for:

(a) All lands set apart for town sites either by the terms of the Atoka agreement, the act of Congress of May 31, 1900 (31 Stats., 221), as herein assented to, or by the terms of this agreement.

(b) All lands to which, at the date of the final ratification of this agreement, any railroad company may

under any treaty or act of Congress have a vested right for right of way, depots, station grounds, water stations, stock yards, or similar uses connected with the maintenance and operation of the railroad.

(c) The strip of land lying between the city of Fort Smith, Arkansas, and the Arkansas and Poteau rivers, extending up the said Poteau River to the mouth of Mill Creek.

(d) All lands which shall be segregated and reserved by the Secretary of the Interior on account of their coal or asphalt deposits, as hereinafter provided. And the lands selected by the Secretary of the Interior at and in the vicinity of Sulphur, in the Chickasaw Nation, under the cession to the United States hereunder made by said tribes.

(e) One hundred and sixty acres for Jones' Academy.

(f) One hundred and sixty acres for Tuskahoma Female Seminary.

(g) One hundred and sixty acres for Wheelock Orphan Seminary.

(h) One hundred and sixty acres for Armstrong Orphan Academy.

(i) Five acres for capitol building of the Choctaw Nation.

(j) One hundred and sixty acres for Bloomfield Academy.

(k) One hundred and sixty acres for Lebanon Orphan Home.

(l) One hundred and sixty acres for Harley Institute.

(m) One hundred and sixty acres for Rock Academy.

(n) One hundred and sixty acres for Collins Institute.

(o) Five acres for the capitol building of the Chickasaw Nation.

(p) Eighty acres for J. S. Murrow.

(q) Eighty acres for H. R. Schermerhorn.

(r) Eighty acres for the widow of R. S. Bell.

(s) A reasonable amount of land, to be determined by the town-site commissioners, to include all tribal court-houses and jails and other tribal public buildings.

(t) Five acres for any cemetery located by the town-site commissioners prior to the date of the final ratification of this agreement.

(u) One acre for any church under the control of and used exclusively by the Choctaw or Chickasaw citizens at the date of the final ratification of this agreement.

(v) One acre each for all Choctaw or Chickasaw schools under the supervision of the authorities of the Choctaw or Chickasaw nations and officials of the United States.

And the acre so reserved for any church or school in any quarter section of land shall be located when practicable in a corner of such quarter section lying adjacent to the section line thereof.

ROLLS OF CITIZENSHIP.

27. The rolls of the Choctaw and Chickasaw citizens and Choctaw and Chickasaw freedmen shall be made by the Commission to the Five Civilized Tribes, in strict compliance with the act of Congress approved June 28, 1898 (30 Stats., 495), and the act of Congress approved May 31, 1900 (31 Stat., 221), except as herein otherwise provided: *Provided*, That no person claiming right to enrollment and allotment and distribution of tribal

property, by virtue of a judgment of the United States court in the Indian Territory under the act of June 10, 1896 (29 Stats., 321), and which right is contested by legal proceedings instituted under the provisions of this agreement, shall be enrolled or receive allotment of lands or distribution of tribal property until his right thereto has been finally determined.

28. The names of all persons living on the date of the final ratification of this agreement entitled to be enrolled as provided in section 27 hereof shall be placed upon the rolls made by said Commission; and no child born thereafter to a citizen or freedman and no person intermarried thereafter to a citizen shall be entitled to enrollment or to participate in the distribution of the tribal property of the Choctaws and Chickasaws.

29. No person whose name appears upon the rolls made by the commission to the Five Civilized Tribes as a citizen or freedman of any other tribe shall be enrolled as a ctizen or freedman of the Choctaw or Chickasaw nations.

30. For the purpose of expediting the enrollment of the Choctaw and Chickasaw citizens and the Choctaw and Chickasaw freedmen, the said Commission shall, from time to time, and as early as practicable, forward to the Secretary of the Interior lists upon which shall be placed names of those persons found by the Commission to be entitled to enrollment. The lists thus prepared, when approved by the Secretary of the Interior, shall constitute a part and parcel of the final rolls of citizens of the Choctaw and Chickasaw tribes and of Choctaw and Chickasaw freedmen, upon which allotment of land and distribution of other tribal property shall be made as herein provided. Lists shall be made up and forwarded when contests of whatever character shall have been determined, and when there shall have

been submitted to and approved by the Secretary of the Interior lists embracing names of all those lawfully entitled to enrollment, the rolls shall be deemed complete. The rolls so prepared shall be made in quintuplicate, one to be deposited with the Secretary of the Interior, one with the Commissioner of Indian Affairs, one with the principal chief of the Choctaw Nation one with the governor of the Chickasaw Nation, and one to remain with the Commission to the Five Civilized Tribes.

31. It being claimed and insisted by the Choctaw and Chickasaw nations that the United States courts in the Indian Territory, acting under the act of Congress approved June 10, 1896, have admitted persons to citizenship or to enrollment as such citizens in the Choctaw and Chickasaw nations, respectively, without notice of the proceedings in such courts being given to each of said nations; and it being insisted by said nations that, in such proceedings, notice to each of said nations was indispensable, and it being claimed and insisted by said nations that the proceedings in the United States courts in the Indian Territory, under the said act of June 10, 1896, should have been confined to a review of the action of the Commission to the Five Civilized Tribes, upon the papers and evidence submitted to such Commission, and should not have extended to a trial de novo of the question of citizenship; and it being desirable to finally determine these questions, the two nations jointly, or either of said nations acting separately and making the other a party defendant, may, within ninety days after this agreement becomes effective, by a bill in equity filed in the Choctaw and Chickasaw citizenship court hereinafter named, seek the annulment and vacation of all such decisions by said courts. Ten persons so admitted to citizenship or enrollment by said courts, with notice

to one, but not to both of said nations, shall be made defendants to said suit as representatives of the entire class of persons similarly situated, the number of such persons being too numerous to require all of them to be made individual parties to the suit; but any person so situated may, upon his application, be made a party defendant to the suit. Notice of the institution of said suit shall be personally served upon the chief executive of the defendant nation, if either nation be made a party defendant as aforesaid, and upon each of said ten representative defendants, and shall also be published for a period of four weeks in at least two weekly newspapers having general circulation in the Choctaw and Chickasaw nations. Such notice shall set forth the nature and prayer of the bill, with the time for answering the same, which shall not be less than thirty days after the last publication. Said suit shall be determined at the earliest practicable time, shall be confined to a final determination of the questions of law here named, and shall be without prejudice to the determination of any charge or claim that the admission of such persons to citizenship or enrollment by said United States courts in the Indian Territory was wrongfully obtained as provided in the next section. In the event said citizenship judgments or decisions are annulled or vacated in the test suit hereinbefore authorized, because of either or both of the irregularities claimed and insisted upon by said nations as aforesaid, then the files, papers, and proceedings in any citizenship case in which the judgment or decision is so annulled or vacated, shall, upon written application therefor, made within ninety days thereafter by any party thereto, who is thus deprived of a favorable judgment upon his claimed citizenship, be transferred and certified to said citizenship court by the court having custody and control of such files, papers, and proceedings, and, upon the filing in such citizenship court of

the files, papers, and proceedings in any such citizenship case, accompanied by due proof that notice in writing of the transfer and certification thereof has been given to the chief executive officer of each of said nations, said citizenship case shall be docketed in said citizenship court, and such further proceedings shall be had therein in that court as ought to have been had in the court to which the same was taken on appeal from the Commission to the Five Civilized Tribes, and as if no judgment or decision had been rendered therein.

32. Said citizenship court shall also have appellate jurisdiction over all judgments of the courts in Indian Territory rendered under said act of Congress of June tenth, eighteen hundred and ninety-six, admitting persons to citizenship or to enrollment as citizens in either of said nations. The right of appeal may be exercised by the said nations jointly or by either of them acting separately at any time within six months after this agreement is finally ratified. In the exercise of such appellate jurisdiction said citizenship court shall be authorized to consider, review, and revise all such judgments, both as to findings of fact and conclusions of law, and may, wherever in its judgment substantial justice will thereby be subserved, permit either party to any such appeal to take and present such further evidence as may be necessary to enable said court to determine the very right of the controversy. And said court shall have power to make all needful rules and regulations prescribing the manner of taking and conducting said appeals and of taking additional evidence therein. Such citizenship court shall also have like appellate jurisdiction and authority over judgments rendered by such courts under the said act denying claims to citizenship or to enrollment as citizens in either of said nations. Such appeals shall be taken within the

time hereinbefore specified and shall be taken, conducted and disposed of in the same manner as appeals by the said nations, save that notice of appeals by citizenship claimants shall be served upon the chief executive officer of both nations: *Provided*, That paragraphs thirty-one, thirty-two, and thirty-three hereof shall go into effect immediately after the passage of this act by Congress.

33. A court is hereby created, to be known as the Choctaw and Chickasaw citizenship court, the existence of which shall terminate upon the final determination of the suits and proceedings named in the last two preceding sections, but in no event later than the thirty-first day of December, nineteen hundred and three. Said court shall have all authority and power necessary to the hearing and determination of the suits and proceedings so committed to its jurisdiction, including the authority to issue and enforce all requisite writs, process, and orders, and to prescribe rules and regulations for the transaction of its business. It shall also have all the powers of a circuit court of the United States in compelling the production of books, papers, and documents, the attendance of witnesses, and in punishing contempt. Except where herein otherwise expressly provided, the pleading, practice, and proceedings in said court shall conform, as near as may be, to the pleadings, practice, and proceedings in equity causes in the circuit courts of the United States. The testimony shall be taken in court or before one of the judges, so far as practicable. Each judge shall be authorized to grant, in vacation or recess, interlocutory orders and to hear and dispose of interlocutory motions not affecting the substantial merits of the case. Said court shall have a chief judge and two associate judges, a clerk, a stenographer, who shall be deputy clerk, and a bailiff. The judges shall be appointed by the President, by and with

the advice and consent of the Senate, and shall each receive a compensation of five thousand dollars per annum and his necessary and actual traveling and personal expenses while engaged in the performance of his duties. The clerk, stenographer, and bailiff shall be appointed by the judges, or a majority of them, and shall receive the following yearly compensation: Clerk, two thousand four hundred dollars; stenographer, twelve hundred dollars; bailiff, nine hundred dollars. The compensation of all these officers shall be paid by the United States in monthly installments. The moneys to pay said compensation are hereby appropriated, and there is also hereby appropriated the sum of five thousand dollars, or so much thereof as may be necessary, to be expended under the direction of the Secretary of the Interior, to pay such contingent expenses of said court and its officers as to such Secretary may seem proper. Said court shall have a seal, shall sit at such place or places in the Choctaw and Chickasaw nations as the judges may designate, and shall hold public session, beginning the first Monday in each month, so far as may be practicable or necessary. Each judge and the clerk and deputy clerk shall be authorized to administer oaths. All writs and process issued by said court shall be served by the United States marshal for the district in which the service is to be had. The fees for serving process and the fees of witnesses shall be paid by the party at whose instance such process is issued or such witnesses are subpœnaed, and the rate or amount of such fees shall be the same as is allowed in civil causes in the circuit court of the United States for the western district of Arkansas. No fees shall be charged by the clerk or other officers of said court. The clerk of the United States court in Indian Territory, having custody and control of the files, papers, and proceedings in the original citizenship cases, shall receive a fee of two dollars and fifty cents for transferring and

certifying to the citizenship court the files, papers, and proceedings in each case, without regard to the number of persons whose citizenship is involved therein, and said fee shall be paid by the person applying for such transfer and certification. The judgment of the citizenship court in any or all of the suits or proceedings so committed to its jurisdiction shall be final. All expenses necessary to the proper conduct, on behalf of the nations, of the suits and proceedings provided for in this and the two preceding sections shall be incurred under the direction of the executives of the two nations, and the Secretary of the Interior is hereby authorized, upon certificate of said executives, to pay such expenses as in his judgment are reasonable and necessary out of any of the joint funds of said nations in the Treasury of the United States.

34. During the ninety days first following the date of the final ratification of this agreement the Commission to the Five Civilized Tribes may receive applications for enrollment only of persons whose names are on the tribal rolls, but who have not heretofore been enrolled by said Commission, commonly known as "delinquents," and such intermarried white persons as may have married recognized citizens of the Choctaw and Chickasaw nations in accordance with the tribal laws, customs and usages on or before the date of the passage of this act by Congress, and such infant children as may have been born to recognized and enrolled citizens on or before the date of final ratification of this agreement; but the application of no person whomsoever for enrollment shall be received after the expiration of the said ninety days: *Provided*, That nothing in this section shall apply to any person or persons making application for enrollment as Mississippi Choctaws, for whom provision has herein otherwise been made.

35. No person whose name does not appear upon the rolls prepared as herein provided shall be entitled to in any manner participate in the distribution of the common property of the Choctaw and Chickasaw tribes, and those whose names appear thereon shall participate in the manner set forth in this agreement: *Provided*, That no allotment of land or other tribal property shall be made to any person, or to the heirs of any person, whose name is on the said rolls, and who died prior to the date of the final ratification of this agreement. The right of such person to any interest in the lands or other tribal property shall be deemed to have become extinguished and to have passed to the tribe in general upon his death before the date of the final ratification of this agreement, and any person or persons who may conceal the death of anyone on said rolls as aforesaid, for the purpose of profiting by the said concealment, and who shall knowingly receive any portion of any land or other tribal property, or of the proceeds so arising from any allotment prohibited by this section, shall be deemed guilty of a felony, and shall be proceeded against as may be provided in other cases of felony, and the penalty for this offense shall be confinement at hard labor for a period of not less than one year nor more than five years, and in addition thereto a forfeiture to the Choctaw and Chickasaw nations of the lands, other tribal property, and proceeds so obtained.

CHICKASAW FREEDMEN.

36. Authority is hereby conferred upon the Court of Claims to determine the existing controversy respecting the relations of the Chickasaw freedmen to the Chickasaw Nation and the rights of such freedmen in the lands of the Choctaw and Chickasaw nations under the third article of the treaty of eighteen hundred and sixty-six, between the United States and the Choctaw and Chicka-

saw nations, and under any and all laws subsequently enacted by the Chickasaw legislature or by Congress.

37. To that end the Attorney-General of the United States is hereby directed, on behalf of the United States, to file in said Court of Claims, within sixty days after this agreement becomes effective, a bill of interpleader against the Choctaw and Chickasaw nations and the Chickasaw freedmen, setting forth the existing controversy between the Chickasaw Nation and the Chickasaw freedmen and praying that the defendants thereto be required to interplead and settle their respective rights in such suit.

38. Service of process in the suit may be had on the Choctaw and Chickasaw nations, respectively, by serving upon the principal chief of the former and the governor of the latter a certified copy of the bill, with a notice of the time for answering the same, which shall not be less than thirty nor more than sixty days after such service, and may be had upon the Chickasaw freedmen by serving upon each of three known and recognized Chickasaw freedmen a certified copy of the bill, with a like notice of the time for answering the same, and by publishing a notice of the commencement of the suit, setting forth the nature and prayer of the bill, with the time for answering the same, for a period of three weeks in at least two weekly newspapers having general circulation in the Chickasaw Nation.

39. The Choctaw and Chickasaw nations, respectively, may in the manner prescribed in sections twenty-one hundred and three to twenty-one hundred and six, both inclusive, of the Revised Statutes, employ counsel to represent them in such suit and protect their interests therein; and the Secretary of the Interior shall employ competent counsel to represent the Chickasaw freedmen

in said suit and to protect their interests therein; and the compensation of counsel so employed for the Chickasaw freedmen, including all costs of printing their briefs and other incidental expenses on their part, not exceeding six thousand dollars, shall be paid out of the Treasury of the United States upon certificate of the Secretary of the Interior setting forth the employment and the terms thereof, and stating that the required services have been duly rendered; and any party feeling aggrieved at the decree of the Court of Claims, or any part thereof, may, within sixty days after the rendition thereof, appeal to the Supreme Court, and in each of said courts the suit shall be advanced for hearing and decision at the earliest practicable time.

40. In the meantime the Commission to the Five Civilized Tribes shall make a roll of the Chickasaw freedmen and their descendants, as provided in the Atoka agreement, and shall make allotments to them as provided in this agreement, which said allotments shall be held by the said Chickasaw freedmen, not as temporary allotments, but as final allotments, and in the event that it shall be finally determined in said suit that the Chickasaw freedmen are not, independently of this agreement, entitled to allotments in the Choctaw and Chickasaw lands, the Court of Claims shall render a decree in favor of the Choctaw and Chickasaw nations according to their respective interests, and against the United States, for the value of the lands so allotted to the Chickasaw freedmen as ascertained by the appraisal thereof made by the Commission to the Five Civilized Tribes for the purpose of allotment, which decree shall take the place of the said lands and shall be in full satisfaction of all claims by the Choctaw and Chickasaw nations against the United States or the said freedmen on account of the taking of the said lands for allotment to

said freedmen: *Provided*, That nothing contained in this paragraph shall be construed to affect or change the existing status or rights of the two tribes as between themselves respecting the lands taken for allotment to freedmen, or the money, if any, recovered as compensation therefor, as aforesaid.

MISSISSIPPI CHOCTAWS.

41. All persons duly identified by the Commission to the Five Civilized Tribes under the provisions of section 21 of the act of Congress approved June 28, 1898 (30 Stats., 495), as Mississippi Choctaws entitled to benefits under article 14 of the treaty between the United States and the Choctaw Nation concluded September 27, 1830, may, at any time within six months after the date of their identification as Mississippi Choctaws by the said Commission, make bona fide settlement within the Choctaw-Chickasaw country, and upon proof of such settlement to such Commission within one year after the date of their said identification as Mississippi Choctaws shall be enrolled by such Commission as Mississippi Choctaws entitled to allotment as herein provided for citizens of the tribes, subject to the special provisions herein provided as to Mississippi Choctaws, and said enrollment shall be final when approved by the Secretary of the Interior. The application of no person for identification as a Mississippi Choctaw shall be received by said Commission after six months subsequent to the date of the final ratification of this agreement, and in the disposition of such applications all full-blood Mississippi Choctaw Indians and the descendants of any Mississippi Choctaw Indians, whether of full or mixed blood, who receive a patent to land under the said fourteenth article of the said treaty of eighteen hundred and thirty who had not moved to and made bona fide settlement in the Choctaw-Chickasaw country prior to

June twenty-eighth, eighteen hundred and ninety-eight, shall be deemed to be Mississippi Choctaws, entitled to benefits under article fourteen of the said treaty of September twenty-seventh, eighteen hundred and thirty, and to identification as such by said Commission, but this direction or provision shall be deemed to be only a rule of evidence and shall not be invoked by or operate to the advantage of any applicant who is not a Mississippi Choctaw of the full blood, or who is not the descendant of a Mississippi Choctaw who received a patent to land under said treaty, or who is otherwise barred from the right of citizenship in the Choctaw Nation. All of said Mississippi Choctaws so enrolled by said Commission shall be upon a separate roll.

42. When any such Mississippi Choctaw shall have in good faith continuously resided upon the lands of the Choctaw and Chickasaw nations for a period of three years, including his residence thereon before and after such enrollment, he shall, upon due proof of such continuous bona fide residence, made in such manner and before such officer as may be designated by the Secretary of the Interior, receive a patent for his allotment, as provided in the Atoka agreement, and he shall hold the lands allotted to him as provided in this agreement for citizens of the Choctaw and Chickasaw nations.

43. Applications for enrollment as Mississippi Choctaws, and applications to have land set apart to them as such, must be made personally before the Commission to the Five Civilized Tribes. Fathers may apply for their minor children; and, if the father be dead, the mother may apply; husbands may apply for wives. Applications for orphans, insane persons, and persons of unsound mind may be made by duly appointed guardian or curator, and for aged and infirm persons and prison-

ers by agents duly authorized thereunto by power of attorney, in the discretion of said Commission.

44. If within four years after such enrollment any such Mississippi Choctaw, or his heirs or representatives if he be dead, fails to make proof of such continuous bona fide residence for the period so prescribed, or up to the time of the death of such Mississippi Choctaw, in case of his death after enrollment, he, and his heirs and representatives if he be dead, shall be deemed to have acquired no interest in the lands set apart to him, and the same shall be sold at public auction for cash, under rules and regulations prescribed by the Secretary of the Interior, and the proceeds paid into the Treasury of the United States to the credit of the Choctaw and Chickasaw tribes, and distributed per capita with other funds of the tribes. Such lands shall not be sold for less than their appraised value. Upon payment of the full purchase price patent shall issue to the purchaser.

TOWN SITES.

45. The Choctaw and Chickasaw tribes hereby assent to the act of Congress approved May 31, 1900 (31 Stats., 221), in so far as it pertains to town sites in the Choctaw and Chickasaw nations, ratifying and confirming all acts of the government of the United States thereunder, and consent to a continuance of the provisions of said act not in conflict with the terms of this agreement.

46. As to those town sites heretofore set aside by the Secretary of the Interior on the recommendation of the Commission to the Five Civilized Tribes, as provided in said act of Congress of May 31, 1900, such additional acreage may be added thereto, in like manner as the original town site was set apart, as may be necessary

for the present needs and reasonable prospective growth of said town sites, the total acreage not to exceed six hundred and forty acres for each town site.

47. The lands which may hereafter be set aside and reserved for town sites upon the recommendation of the Commission to the Five Civilized Tribes, under the provisions of said act of May 31, 1900, shall embrace such acreage as may be necessary for the present needs and reasonable prospective growth of such town sites, not to exceed six hundred and forty acres for each town site.

48. Whenever any tract of land shall be set aside for town-site purposes, as provided in said act of May 31, 1900, or by the terms of this agreement, which is occupied by any member of the Choctaw or Chickasaw nations, such occupant shall be fully compensated for his improvements thereon, out of the funds of the tribes arising from the sale of town sites, under rules and regulations to be prescribed by the Secretary of the Interior, the value of such improvements to be determined by a board of appraisers, one member of which shall be appointed by the Secretary of the Interior, one by the chief executive of the tribe in which the town site is located, and one by the occupant of the land, said board of appraisers to be paid such compensation for their services as may be determined by the Secretary of the Interior out of any appropriation for surveying, laying out, platting, and selling town sites.

49. Whenever the chief executive of the Choctaw or Chickasaw Nation fails or refuses to appoint a town-site commissioner for any town, or to fill any vacancy caused by the neglect or refusal of the town-site commissioner appointed by the chief executive of the Choctaw or Chickasaw Nation to qualify or act, or otherwise, the Secretary of the Interior, in his discretion, may appoint a commissioner to fill the vacancy thus created.

50. There shall be appointed, in the manner provided in the Atoka agreement, such additional town-site commissions as the Secretary of the Interior may deem necessary, for the speedy disposal of all town sites in said nations: *Provided*, That the jurisdiction of said additional town-site commission shall extend to such town sites only as shall be designated by the Secretary of the Interior.

51. Upon the payment of the full amount of the purchase price of any lot in any town site in the Choctaw and Chickasaw nations, appraised and sold as herein provided, or sold as herein provided, the chief executives of said nations shall jointly execute, under their hands and the seals of the respective nations and deliver to the purchaser of the said lot a patent conveying to him all right, title, and interest of the Choctaw and Chickasaw tribes in and to said lot.

52. All town lots in any one town site to be conveyed to one person shall, as far as practicable, be included in one patent, and all patents shall be executed free of charge to the grantee.

53. Such towns in the Choctaw and Chickasaw nations as may have a population of less than two hundred people, not otherwise provided for, and which in the judgment of the Secretary of the Interior should be set aside as town sites, shall have their limits defined not later than ninety days after the final ratification of this agreement, in the same manner as herein provided for other town sites; but in no such case shall more than forty acres of land be set aside for any such town site.

54. All town sites heretofore set aside by the Secretary of the Interior on the recommendation of the Commission to the Five Civilized Tribes, under the provisions of the act of Congress approved May 31, 1900 (31 Stat., 221), with the additional acreage added thereto, and

all town sites which may hereafter be set aside, as well as all town sites set aside under the provisions of this agreement having a population of less than two hundred, shall be surveyed, laid out, platted, appraised, and disposed of in a like manner, and with like preference rights accorded to owners of improvements as other town sites in the Choctaw and Chickasaw nations are surveyed, laid out, platted, appraised, and disposed of under the Atoka agreement, as modified or supplemented by the said act of May 31, 1900: *Provided*, That occupants or purchasers of lots in town sites in said Choctaw and Chickasaw nations upon which no improvements have been made prior to the passage of this act by Congress shall pay the full appraised value of said lots instead of the percentage named in the Atoka agreement.

MUNICIPAL CORPORATIONS.

55. Authority is hereby conferred upon municipal corporations in the Choctaw and Chickasaw nations, with the approval of the Secretary of the Interior, to issue bonds and borrow money thereon for sanitary purposes and for the construction of sewers, lighting plants, waterworks, and schoolhouses, subject to all the provisions of laws of the United States in force in the organized Territories of the United States in reference to municipal indebtedness and issuance of bonds for public purposes; and said provisions of law are hereby put in force in said nations and made applicable to the cities and towns therein the same as if specially enacted in reference thereto; and said municipal corporations are hereby authorized to vacate streets and alleys, or parts thereof, and said streets and alleys, when so vacated, shall become the property of the adjacent property holders.

56. At the expiration of two years after the final ratification of this agreement all deposits of coal and asphalt which are in lands within the limits of any town site established under the Atoka agreement, or the act of Congress of May 31, 1900, or this agreement, and which are within the exterior limits of any lands reserved from allotment on account of their coal or asphalt deposits, as herein provided, and which are not at the time of the final ratification of this agreement embraced in any then existing coal or asphalt lease, shall be sold at public auction for cash under the direction of the President as hereinafter provided, and the proceeds thereof disposed of as herein provided respecting the proceeds of the sale of coal and asphalt lands.

57. All coal and asphalt deposits which are within the limits of any town site so established, which are at the date of the final ratification of this agreement covered by any existing lease, shall at the expiration of two years after the final ratification of this agreement, be sold at public auction under the direction of the President as hereinafter provided, and the proceeds thereof disposed of as provided in the last preceding section. The coal or asphalt covered by each lease shall be separately sold. The purchaser shall take such coal or asphalt deposits subject to the existing lease, and shall by the purchase succeed to all the rights of the two tribes of every kind and character, under the lease, but all advanced royalties received by the tribe shall be retained by them.

58. Within six months after the final ratification of this agreement the Secretary of the Interior shall ascertain, so far as may be practicable, what lands are principally valuable because of their deposits of coal or

asphalt, including therein all lands which at the time of the final ratification of this agreement shall be covered by then existing coal or asphalt leases, and within that time he shall, by a written order, segregate and reserve from allotment all of said lands. Such segregation and reservation shall conform to the subdivisions of the government survey as nearly as may be, and the total segregation and reservation shall not exceed five hundred thousand acres. No lands so reserved shall be allotted to any member or freedman, and the improvements of any member or freedman existing upon any of the lands so segregated and reserved at the time of their segregation and reservation shall be appraised under the direction of the Secretary of the Interior, and shall be paid for out of any common funds of the two tribes in the Treasury of the United States, upon the order of the Secretary of the Interior. All coal and asphalt deposits, as well as other minerals which may be found in any lands not so segregated and reserved, shall be deemed a part of the land and shall pass to the allottee or other person who may lawfully acquire title to such lands.

59. All lands segregated and reserved under the last preceding section, excepting those embraced within the limits of a town site, established as hereinbefore provided, shall, within three years from the final ratification of this agreement and before the dissolution of the tribal governments, be sold at public auction for cash, under the direction of the President, by a commission composed of three persons, which shall be appointed by the President, one on the recommendation of the principal chief of the Choctaw Nation, who shall be a Choctaw by blood, and one on the recommendation of the governor of the Chickasaw Nation, who shall be a Chickasaw by blood. Either of said commissioners may, at any time,

be removed by the President for good cause shown. Each of said commissioners shall be paid at the rate of four thousand dollars per annum, the Choctaw commissioner to be paid by the Choctaw Nation, the Chickasaw commissioner to be paid by the Chickasaw Nation, and the third commissioner to be paid by the United States. In the sale of coal and asphalt lands and coal and asphalt deposits hereunder, the commission shall have the right to reject any or all bids which it considers below the value of any such lands or deposits. The proceeds arising from the sale of coal and asphalt lands and coal and asphalt deposits shall be deposited in the Treasury of the United States to the credit of said tribes and paid out per capita to the members of said tribes (freedmen excepted) with the other moneys belonging to said tribes in the manner provided by law. The lands embraced within any coal or asphalt lease shall be separately sold, subject to such lease, and the purchaser shall succeed to all the rights of the two tribes of every kind and character, under the lease, but all advanced royalties received by the tribes shall be retained by them. The lands so segregated and reserved, and not included within any existing coal or asphalt lease, shall be sold in tracts not exceeding in area a section under the government survey.

60. Upon the recommendation of the chief executive of each of the two tribes, and where in the judgment of the President it is advantageous to the tribes so to do, the sale of any coal or asphalt lands which are herein directed to be sold may be made at any time after the expiration of six months from the final ratification of this agreement, without awaiting the expiration of the period of two years, as hereinbefore provided.

61. No lease of any coal or asphalt lands shall be made after the final ratification of this agreement, the

provisions of the Atoka agreement to the contrary notwithstanding.

62. Where any lands so as aforesaid segregated and reserved on account of their coal or asphalt deposits are in this agreement specifically reserved from allotment for any other reason, the sale to be made hereunder shall be only of the coal and asphalt deposits contained therein, and in all other respects the other specified reservation of such lands herein provided for shall be fully respected.

63. The chief executives of the two tribes shall execute and deliver, with the approval of the Secretary of the Interior, to each purchaser of any coal or asphalt lands so sold, and to each purchaser of any coal or asphalt deposits so sold, an appropriate patent or instrument of conveyance, conveying to the purchaser the property so sold.

SULPHUR SPRINGS.

64. The two tribes hereby absolutely and unqualifiedly relinquish, cede, and convey unto the United States a tract or tracts of land at and in the vicinity of the village of Sulphur, in the Chickasaw Nation, of not exceeding six hundred and forty acres, to be selected, under the direction of the Secretary of the Interior, within four months after the final ratification of this agreement, and to embrace all the natural springs in and about said village, and so much of Sulphur Creek, Rock Creek, Buckhorn Creek, and the lands adjacent to said natural springs and creeks as may be deemed necessary by the Secretary of the Interior for the proper utilization and control of said springs and the waters of said creeks, which lands shall be so selected as to cause the least interference with the contemplated town site at that place consistent with the purposes for which said

cession is made, and when selected the ceded lands shall be held, owned, and controlled by the United States absolutely and without any restriction, save that no part thereof shall be platted or disposed of for town-site purposes, during the existence of the two tribal governments. Such other lands as may be embraced in a town site at that point shall be disposed of in the manner provided in the Atoka agreement for the disposition of town sites. Within ninety days after the selection of the lands so ceded there shall be deposited in the Treasury of the United States, to the credit of the two tribes, from the unappropriated public moneys of the United States, twenty dollars per acre for each acre so selected, which shall be in full compensation for the lands so ceded, and such moneys shall, upon the dissolution of the tribal governments, be divided per capita among the members of the tribes, freedmen excepted, as are other funds of the tribes. All improvements upon the lands so selected which were lawfully there at the time of the ratificaton of this agreement by Congress shall be appraised, under the direction of the Secretary of the Interior, at the true value thereof at the time of the selection of said lands, and shall be paid for by warrants drawn by the Secretary of the Interior upon the Treasurer of the United States. Until otherwise provided by law, the Secretary of the Interior may, under rules prescribed for that purpose, regulate and control the use of the water of said springs and creeks and the temporary use and occupation of the lands so ceded. No person shall occupy any portion of the lands so ceded or carry on any business thereon, except as provided in said rules, and until otherwise provided by Congress the laws of the United States relating to the introduction, possession, sale, and giving away of liquors or intoxicants of any kind within the Indian country or Indian reservations shall be applicable to the lands so ceded, and said lands shall re-

main within the jurisdiction of the United States court for the southern district of Indian Territory: *Provided, however,* That nothing contained in this section shall be construed or held to commit the government of the United States to any expenditure of money upon said lands or the improvements thereof, except as provided herein, it being the intention of this provision that in the future the lands and improvements herein mentioned shall be conveyed by the United States to such Territorial or State organization as may exist at the time when such conveyance is made.

MISCELLANEOUS.

65. The acceptance of patents for minors, prisoners, convicts, and incompetents by persons authorized to select their allotments for them shall be sufficient to bind such minors, prisoners, convicts, and incompetents as to the conveyance of all other lands of the tribes.

66. All patents to allotments of land, when executed, shall be recorded in the office of the Commission to the Five Civilized Tribes within said nations in books appropriate for the purpose, until such time as Congress shall make other suitable provision for record of land titles as provided in the Atoka agreement, without expense to the grantee; and such records shall have like effect as other public records.

67. The provisions of section three of the act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight (30 Stats., 495), shall not apply to or in any manner affect the lands or other property of the Choctaws and Chickasaws or Choctaw and Chickasaw freedmen.

68. No act of Congress or treaty provision, nor any provision of the Atoka agreement, inconsistent with

this agreement, shall be in force in said Choctaw and Chickasaw nations.

69. All controversies arising between members as to their right to select particular tracts of land shall be determined by the Commission to the Five Civilized Tribes.

70. Allotments may be selected and homesteads designated for minors by the father or mother, if members, or by a guardian or curator, or the administrator having charge of their estate, in the order named; and for prisoners, convicts, aged, and infirm persons by duly appointed agents under power of attorney; and for incompetents by guardians, curators, or other suitable person akin to them; but it shall be the duty of said Commission to see that said selections are made for the best interests of such parties.

71. After the expiration of nine months after the date of the original selection of an allotment, by or for any citizen or freedman of the Choctaw or Chickasaw tribes, as provided in this agreement, no contest shall be instituted against such selection.

72. There shall be paid to each citizen of the Chickasaw Nation, immediately after the approval of his enrollment and right to participate in distribution of tribal property, as herein provided, the sum of forty dollars. Such payment shall be made under the direction of the Secretary of the Interior, and out of the balance of the "arrears of interest" of five hundred and fifty-eight thousand five hundred and twenty dollars and fifty-four cents appropriated by the act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, entitled "An act for the protection of the people of the Indian Territory, and for other purposes," yet due to the Chickasaws and remaining to their credit

in the Treasury of the United States; and so much of such moneys as may be necessary for such payment are hereby appropriated and made available for that purpose, and the balance, if any there be, shall remain in the Treasury of the United States, and be distributed per capita with the other funds of the tribes. And all acts of Congress or other treaty provisions in conflict with this provision are hereby repealed.

73. This agreement shall be binding upon the United States and upon the Choctaw and Chickasaw nations and all Choctaws and Chickasaws, when ratified by Congress and by a majority of the whole number of votes cast by the legal voters of the Choctaw and Chickasaw tribes in the manner following: The principal chief of the Choctaw Nation and the governor of the Chickasaw Nation shall, within one hundred and twenty days after the ratification of this agreement by Congress, make public proclamation that the same shall be voted upon at any special election to be held for that purpose within thirty days thereafter, on a certain day therein named; and all male citizens of each of the said tribes qualified to vote under the tribal laws shall have a right to vote at the election precinct most convenient to his residence, whether the same be within the bounds of his tribe or not. And if this agreement be ratified by said tribes as aforesaid, the date upon which said election is held shall be deemed to be the date of final ratification.

74. The votes cast in both the Choctaw and Chickasaw nations shall be forthwith returned and duly certified by the precinct officers to the national secretaries of said tribes, and shall be presented by said national secretaries to a board of commissioners consisting of the principal chief and the national secretary of the Choctaw Nation and the governor and national secretary of the Chickasaw Nation and two members of the

Commission to the Five Civilized Tribes; and said board shall meet without delay at Atoka, Indian Territory, and canvass and count said votes, and make proclamation of the result.

In witness whereof, the said Commissioners do hereby affix their names at Washington, District of Columbia, this twenty-first day of March, 1902.

Approved July 1, 1902.

[Cherokee agreement (32 Stat. L., 716).]

AN ACT TO provide for the allotment of the lands of the Cherokee Nation, for the disposition of town sites therein, and for other purposes.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

DEFINITION OF WORDS EMPLOYED HEREIN.

SECTION 1. The words "nation" and "tribe" shall each be held to refer to the Cherokee Nation or tribe of Indians in Indian Territory.

SEC. 2. The words "principal chief" or "chief executive" shall be held to mean the principal chief of said tribe.

SEC. 3. The words "Dawes Commission" or "Commission" shall be held to mean the United States Commission to the Five Civilized Tribes.

SEC. 4. The word "minor" shall be held to mean males under the age of twenty-one years and females under the age of eighteen years.

SEC. 5. The terms "allottable lands" or "lands allottable" shall be held to mean all the lands of the Cherokee tribe not herein reserved from allotment.

SEC. 6. The word "select" and its various modifications, as applied to allotments and homesteads, shall be held to mean the formal application at the land office, to be established by the Dawes Commission for the Cherokee Nation, for particular tracts of land.

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*This agreement ratified by Cherokee Nation at an election held August 7, 1902.

SEC. 7. The words "member" or "members" and "citizen" or "citizens" shall be held to mean members or citizens of the Cherokee Nation, in the Indian Territory.

SEC. 8. Every word in this act importing the masculine gender may extend and be applied to females as well as males, and the use of the plural may include also the singular, and vice versa.

APPRAISEMENT OF LANDS.

SEC. 9. The lands belonging to the Cherokee tribe of Indians in Indian Territory, except such as are herein reserved from allotment, shall be appraised at their true value: *Provided*, That in the determination of the value of such land consideration shall not be given to the location thereof, to any timber thereon, or to any mineral deposits contained therein, and shall be made without reference to improvements which may be located thereon.

SEC. 10. The appraisement, as herein provided, shall be made by the Commission to the Five Civilized Tribes, under the direction of the Secretary of the Interior.

ALLOTMENT OF LANDS.

SEC. 11. There shall be allotted by the Commission to the Five Civilized Tribes and to each citizen of the Cherokee tribe, as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided, land equal in value to one hundred and ten acres of the average allottable lands of the Cherokee Nation, to conform as nearly as may be to the areas and boundaries established by the Government survey, which land may be selected by each allottee so as to include his improvements.

SEC. 12. For the purpose of making allotments and designating homesteads hereunder, the forty-acre, or quarter of a quarter section, subdivision established by the Government survey may be dealt with as if further subdivided into four equal parts in the usual manner, thus making the smallest legal subdivision ten acres, or a quarter of a quarter of a quarter of a section.

SEC. 13. Each member of said tribe shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to forty acres of the average allottable lands of the Cherokee Nation, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of the certificate of allotment. Separate certificate shall issue for said homestead. During the time said homestead is held by the allottee the same shall be nontaxable and shall not be liable for any debt contracted by the owner thereof while so held by him.

SEC. 14. Lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation, or be alienated by the allottee or his heirs, before the expiration of five years from the date of the ratification of this act.

SEC. 15. All lands allotted to the members of said tribe, except such land as is set aside to each for a homestead as herein provided, shall be alienable in five years after issuance of patent.

SEC. 16. If for any reason an allotment should not be selected or a homestead designated by or on behalf of any member of the tribe, it shall be the duty of said Commission to make said selection and designation.

SEC. 17. In the making of allotments and in the designation of homesteads for members of said tribe, said Commission shall not be required to divide lands into tracts of less than the smallest legal subdivision provided for in section twelve hereof.

SEC. 18. It shall be unlawful after ninety days after the ratification of this act by the Cherokees for any member of the Cherokee tribe to inclose or hold possession of, in any manner, by himself or through another, directly or indirectly, more lands in value than that of one hundred and ten acres of average allottable lands of the Cherokee Nation, either for himself or for his wife, or for each of his minor children, if members of said tribe; and any member of said tribe found in such possession of lands, or having the same in any manner inclosed, after the expiration of ninety days after the date of the ratification of this act shall be deemed guilty of a misdemeanor.

SEC. 19. Any person convicted of violating any of the provisions of section eighteen of this act shall be punished by a fine of not less than one hundred dollars, shall stand committed until such fine and costs are paid (such commitment not to exceed one day for every two dollars of said fine and costs), and shall forfeit possession of any property in question, and each day on which such offense is committed or continues to exist shall be deemed a separate offense. The United States district attorney for the northern district is required to see that the provisions of said section eighteen are strictly enforced, and he shall immediately, after the expiration of the ninety days after the ratification of this act, proceed to dispossess all persons of such excessive holdings of lands and to prosecute them for so unlawfully holding the same, and the Commission to the Five Civilized Tribes shall have authority to make

investigations of all violations of section eighteen and make report thereon to the United States district attorney.

SEC. 20. If any person whose name appears upon the roll prepared as herein provided shall have died subsequent to the first day of September, nineteen hundred and two, and before receiving his allotment, the lands to which such person would have been entitled if living shall be allotted in his name, and shall, with his proportionate share of other tribal property, descend to his heirs according to the laws of descent and distribution as provided in chapter forty-nine of Mansfield's Digest of the Statutes of Arkansas: *Provided*, That the allotment thus to be made shall be selected by a duly appointed administrator or executor. If, however, such administrator or executor be not duly and expeditiously appointed, or fails to act promptly when appointed, or for any other cause such selection be not so made within a reasonable and proper time, the Dawes Commission shall designate the lands thus to be allotted.

SEC. 21. Allotment certificates issued by the Dawes Commission shall be conclusive evidence of the right of an allottee to the tract of land described therein, and the United States Indian agent for the Union Agency shall, under the direction of the Secretary of the Interior, upon the application of the allottee, place him in possession of his allotment, and shall remove therefrom all persons objectionable to him, and the acts of the Indian agent hereunder shall not be controlled by the writ or process of any court.

SEC. 22. Exclusive jurisdiction is hereby conferred upon the Commission to the Five Civilized Tribes, under the direction of the Secretary of the Interior, to determine all matters relative to the appraisement and the allotment of lands.

SEC. 23. All Delaware Indians who are members of the Cherokee Nation shall take lands and share in the funds of the tribe, as their rights may be determined by the Delawares against the Cherokee Nation, and preme Court if appealed, in the suit instituted therein by the Delawares against the Cherokee Nation, and now pending; but if said suit be not determined before said Commission is ready to begin the allotment of lands of the tribe as herein provided, the Commission shall cause to be segregated one hundred and fifty-seven thousand six hundred acres of land, including lands which have been selected and occupied by Delawares in conformity to the provisions of their agreement with the Cherokees dated April eighth, eighteen hundred and sixty-seven, such lands so to remain, subject to disposition according to such judgment as may be rendered in said cause; and said Commission shall thereupon proceed to the allotment of the remaining lands of the tribe as aforesaid. Said Commission shall, when final judgment is rendered, allot lands to such Delawares in conformity to the terms of the judgment and their individual rights thereunder. Nothing in this act shall in any manner impair the rights of either party to said contract as the same may be finally determined by the court, or shall interfere with the holdings of the Delawares under their contract with the Cherokees of April eighth, eighteen hundred and sixty-seven, until their rights under said contract are determined by the courts in their suit now pending against the Cherokees, and said suit shall be advanced on the dockets of said courts and determined at the earliest time practicable.

RESERVATIONS.

SEC. 24. The following lands shall be reserved from the allotment of lands herein provided for:

(a) All lands set apart for town sites by the provision of the act of Congress of June twenty-eighth, eighteen hundred and ninety-eight (Thirtieth Statutes, page four hundred and ninety-five), the provisions of the act of Congress of May thirty-first, nineteen hundred (Thirty-first Statutes, page two hundred and twenty-one), and by the provisions of this act.

(b) All lands to which, upon the date of the ratification of this act, any railroad company may, under any treaty or act of Congress, have a vested right for right of way, depots, station grounds, water stations, stock yards, or similar uses only, connected with the maintenance and operation of the railroad.

(c) All lands selected for town cemeteries not to exceed twenty acres each.

(d) One acre of land for each Cherokee schoolhouse not included in town sites or herein otherwise provided for.

(e) Four acres for Willie Halsell College at Vinita.

(f) Four acres for Baptist Mission school at Tahlequah.

(g) Four acres for Presbyterian school at Tahlequah.

(h) Four acres for Park Hill Mission school south of Tahlequah.

(i) Four acres for Elm Springs Mission school at Barren Fork.

(j) Four acres for Dwight Mission school at Sallisaw.

(k) Four acres for Skiatook Mission near Skiatook.

(l) Four acres for Lutheran Mission school on Illinois River north of Tahlequah.

(m) Sufficient ground for burial purposes where neighborhood cemeteries are now located, not to exceed three acres each.

(n) One acre for each church house outside of towns.

(o) The square now occupied by the capitol building at Tahlequah.

(p) The grounds now occupied by the national jail at Tahlequah.

(q) The grounds now occupied by the Cherokee Advocate printing office at Tahlequah.

(r) Forty acres for the Cherokee Male Seminary near Tahlequah.

(s) Forty acres for the Cherokee Female Seminary at Tahlequah.

(t) One hundred and twenty acres for the Cherokee Orphan Asylum on Grand River.

(u) Forty acres for colored high school in Tahlequah district.

(v) Forty acres for the Cherokee Insane Asylum.

(w) Four acres for the school for blind, deaf, and dumb children near Fort Gibson.

The acre so reserved for any church or schoolhouse in any quarter section of land shall be located where practicable in a corner of such quarter section adjacent to the section lines thereof.

Provided, That the Methodist Episcopal Church South may, within twelve months after the ratification of this act, pay ten dollars per acre for the one hundred and sixty acres of land adjacent to the town of Vinita, and

heretofore set apart by act of the Cherokee national council for the use of said church for missionary and educational purposes, and now occupied by Willie Halsell College (formerly Galloway College), and shall thereupon receive title thereto; but if said church fail so to do it may continue to occupy said one hundred and sixty acres of land as long as it uses same for the purposes aforesaid.

Any other school or college in the Cherokee Nation which claims to be entitled under the law to a greater number of acres than is set apart for said school or college by section twenty-four of this act may have the number of acres to which it is entitled by law. The trustees of such school or college shall, within sixty days after the ratification of this act, make application to the Secretary of the Interior for the number of acres to which such school or college claims to be entitled, and if the Secretary of the Interior shall find that such school or college is, under the laws and treaties of the Cherokee Nation in force prior to the ratification of this act, entitled to a greater number of acres of land than is provided for in this act, he shall so determine and his decision shall be final. The amount so found by the Secretary of the Interior shall be set apart for the use of such college or school as long as the same may be used for missionary and educational purposes: *Provided*, That the trustees of such school or college shall pay ten dollars per acre for the number of acres so found by the Secretary of the Interior and which have been heretofore set apart by act of the Cherokee national council for use of such school or college for missionary or educational purposes, and upon the payment of such sum within sixty days after the decision of the Secretary of the Interior said college or school may receive a title to such land.

ROLL OF CITIZENSHIP.

SEC. 25. The roll of citizens of the Cherokee Nation shall be made as of September first, nineteen hundred and two, and the names of all persons then living and entitled to enrollment on that date shall be placed on said roll by the Commission to the Five Civilized Tribes.

SEC. 26. The names of all persons living on the first day of September, nineteen hundred and two, entitled to be enrolled as provided in section twenty-five hereof, shall be placed upon the roll made by said Commission, and no child born thereafter to a citizen, and no white person who has intermarried with a Cherokee citizen since the sixteenth day of December, eighteen hundred and ninety-five, shall be entitled to enrollment or to participate in the distribution of the tribal property of the Cherokee Nation.

SEC. 27. Such rolls shall in all other respects be made in strict compliance with the provisions of section twenty-one of the act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight (Thirtieth Statutes, page four hundred and ninety-five), and the act of Congress approved May thirty-first, nineteen hundred (Thirty-first Statutes, page two hundred and twenty-one).

SEC. 28. No person whose name appears upon the roll made by the Dawes Commission as a citizen or freedman of any other tribe shall be enrolled as a citizen of the Cherokee Nation.

SEC. 29. For the purpose of expediting the enrollment of the Cherokee citizens and the allotment of lands as herein provided, the said Commission shall, from time to time, and as soon as practicable, forward to the Secretary of the Interior lists upon which shall be

placed the names of those persons found by the Commission to be entitled to enrollment. The lists thus prepared, when approved by the Secretary of the Interior, shall constitute a part and parcel of the final roll of citizens of the Cherokee tribe upon which allotment of land and distribution of other tribal property shall be made. When there shall have been submitted to and approved by the Secretary of the Interior lists embracing the names of all those lawfully entitled to enrollment, the roll shall be deemed complete. The roll so prepared shall be made in quadruplicate, one to be deposited with the Secretary of the Interior, one with the Commissioner of Indian Affairs, one with the principal chief of the Cherokee Nation, and one to remain with the Commission to the Five Civilized Tribes.

SEC. 30. During the months of September and October, in the year nineteen hundred and two, the Commission to the Five Civilized Tribes may receive applications for enrollment of such infant children as may have been born to recognized and enrolled citizens of the Cherokee Nation on or before the first day of September, nineteen hundred and two, but the application of no person whomsoever for enrollment shall be received after the thirty-first day of October, nineteen hundred and two.

SEC. 31. No person whose name does not appear upon the roll prepared as herein provided shall be entitled to in any manner participate in the distribution of the common property of the Cherokee tribe, and those whose names appear thereon shall participate in the manner set forth in this act: *Provided*, That no allotment of land or other tribal property shall be made to any person, or to the heirs of any person, whose name is on said roll and who died prior to the first day of September, nineteen hundred and two. The right of

such person to any interest in the lands or other tribal property shall be deemed to have become extinguished and to have passed to the tribe in general upon his death before said date, and any person or persons who may conceal the death of anyone on said roll as aforesaid for the purpose of profiting by said concealment, and who shall knowingly receive any portion of any land or other tribal property or of the proceeds so arising from any allotment prohibited by this section, shall be deemed guilty of a felony, and shall be proceeded against as may be provided in other cases of felony, and the penalty for this offense shall be confinement at hard labor for a period of not less than one year nor more than five years, and in addition thereto a forfeiture to the Cherokee Nation of the lands, other tribal property, and proceeds so obtained.

SCHOOLS.

SEC. 32. The Cherokee school fund shall be used, under the direction of the Secretary of the Interior, for the education of children of Cherokee citizens, and the Cherokee schools shall be conducted under rules prescribed by him according to Cherokee laws, subject to such modifications as he may deem necessary to make the schools most effective and to produce the best possible results; said schools to be under the supervision of a supervisor appointed by the Secretary and a school board elected by the national council.

SEC. 33. All teachers shall be examined by said supervisor, and said school board and competent teachers and other persons to be engaged in and about the schools with good moral character only shall be employed; but where all qualifications are equal, preference shall be given to citizens of the Cherokee Nation in such employment.

SEC. 34. All moneys for carrying on the schools shall be appropriated by the Cherokee national council, not to exceed the amount of the Cherokee school fund; but if the council fail or refuse to make the necessary appropriations, the Secretary of the Interior may direct the use of a sufficient amount of the school fund to pay all necessary expenses for the efficient conduct of the schools, strict account therefor to be rendered to him and the principal chief.

SEC. 35. All accounts for expenditures in carrying on the schools shall be examined and approved by said supervisor, and also by the general superintendent of Indian schools in the Indian Territory, before payment thereof is made.

SEC. 36. The interest arising from the Cherokee orphan fund shall be used, under the direction of the Secretary of the Interior, for maintaining the Cherokee Orphan Asylum for the benefit of the Cherokee orphan children.

ROADS.

SEC. 37. Public highways or roads two rods in width, being one rod on each side of the section line, may be established along all section lines without any compensation being paid therefor, and all allottees, purchasers, and others shall take the title to such lands subject to this provision; and public highways or roads may be established elsewhere whenever necessary for the public good, the actual value of the land taken elsewhere than along section lines to be determined under the direction of the Secretary of the Interior while the tribal government continues and to be paid by the Cherokee Nation during that time; and if buildings or other improvements are damaged in consequence of the establishment of such public highways or roads, whether

along section lines or elsewhere, such damages, during the continuance of the tribal government, shall be determined and paid for in the same manner.

TOWN SITES.

SEC. 38. The lands which may hereafter be set aside and reserved for town sites upon the recommendation of the Dawes Commission under the provisions of the act of Congress approved May thirty-first, nineteen hundred (Thirty-first Statutes, page two hundred and twenty-one), shall embrace such acreage as may be necessary for the present needs and reasonable prospective growth of such town sites, not to exceed six hundred and forty acres for each town site.

SEC. 39. Whenever any tract of land shall be set aside by the Secretary of the Interior for town-site purposes, as provided in said act of May thirty-first, nineteen hundred, or by the terms of this act, which is occupied at the time of such segregation by any member of the Cherokee Nation, such occupant shall be allowed to purchase any lot upon which he then has improvements other than fences, tillage, and temporary improvements, in accordance with the provisions of the act of June twenty-eighth, eighteen hundred and ninety-eight (Thirtieth Statutes, page four hundred and ninety-five), or, if he so elects, the lot will be sold under rules and regulations to be prescribed by the Secretary of the Interior, and he shall be fully compensated for his improvements thereon out of the funds of the tribe arising from the sale of the town sites, the value of such improvements to be determined by a board of appraisers, one member of which shall be appointed by the Secretary of the Interior, one by the chief executive of the tribe, and one by the occupant of the land, said board of appraisers to be paid such com-

pensation for their services as may be determined by the Secretary of the Interior out of any appropriations for surveying, laying out, platting, and selling town sites.

SEC. 40. All town sites which may hereafter be set aside by the Secretary of the Interior on the recommendation of the Commission to the Five Civilized Tribes, under the provisions of the act of Congress approved May thirty-first, nineteen hundred (Thirty-first Statutes, page two hundred and twenty-one), with the additional acreage added thereto, as well as all town sites set aside under the provisions of this act having a population of less than two hundred, shall be surveyed, laid out, platted, appraised, and disposed of in like manner, and with like preference rights accorded to owners of improvements as other town sites in the Cherokee Nation are surveyed, laid out, platted, appraised, and disposed of under the act of Congress of June twenty-eighth, eighteen hundred and ninety-eight (Thirtieth Statutes, page four hundred and ninety-five), as modified or supplemented by the act of May thirty-first, nineteen hundred: *Provided*, That as to the town sites set aside as aforesaid, the owner of the improvements shall be required to pay the full appraised value of the lot instead of the percentage named in said act of June twenty-eighth, eighteen hundred and ninety-eight (Thirtieth Statutes, page four hundred and ninety-five).

SEC. 41. Any person being in possession or having the right to the possession of any town lot or lots, as surveyed and platted under the direction of the Secretary of the Interior, in accordance with the act of Congress approved May thirty-first, nineteen hundred (Thirty-first Statutes, page two hundred and twenty-one), the occupancy of which lot or lots was originally

acquired under any town-site act of the Cherokee Nation, and owning improvements thereon, other than temporary buildings, fencing, or tillage, shall have the right to purchase the same at one-fourth of the appraised value thereof.

SEC. 42. Any person being in possession of, or having the right to the possession of, any town lot or lots, as surveyed and platted under the direction of the Secretary of the Interior, in accordance with the act of Congress approved May thiry-first, nineteen hundred (Thirty-first Statutes, page two hundred and twenty-one), the occupancy of which lot or lots was orignally acquired under any town-site act of the Cherokee Nation, and not having any improvements thereon, shall have the right to purchase the same at one-half of the appraised value thereof.

SEC. 43. Any citizen in rightful possession of any town lot having improvements thereon other than temporary buildings, fencing, and tillage, the occupancy of which has not been acquired under tribal laws, shall have the right to purchase same by paying one-half the appraised value thereof: *Provided*, That any other person in undisputed possession of any town lot having improvements thereon other than temporary buildings, fencing, and tillage, the occupacy of which has not been acquired under tribal laws, shall have the right to purchase such lot by paying the appraised value thereof.

SEC. 44. All lots not having thereon improvements other than temporary buildings, fencing, and tillage, the sale or disposition of which is not herein otherwise specifically provided for, shall be sold within twelve months after appraisement, under the direction of the Secretary of the Interior, after due advertisement, at

public auction, to the highest bidder, at not less than their appraised value.

SEC. 45. When the appraisement of any town lot is made and approved, the town-site commission shall notify the claimant thereof of the amount of appraisement, and he shall, within sixty days thereafter, make payment of ten per centum of the amount due for the lot, and four months thereafter he shall pay fifteen per centum additional, and the remainder of the purchase money he shall pay in three equal annual installments without interest; but if the claimant of any such lot fail to purchase same or make the first and second payments aforesaid or make any other payment within the time specified, the lot and improvements shall be sold at public auction to the highest bidder, under the direction of the Secretary of the Interior, at a price not less than its appraised value.

SEC. 46. When any improved lot shall be sold at public auction because of the failure of the person owning improvements thereon to purchase same within the time allowed in said act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight (Thirtieth Statutes, page four hundred and ninety-five), said improvements shall be appraised by a committee, one member of which shall be selected by the owner of the improvements and one member by the purchaser of said lot; and in case the said committee is not able to agree upon the value of said improvements, the committee may select a third member, and in that event the determination of the majority of the committee shall control. Said committee of appraisement shall be paid such compensation for their services by the two parties in interest, share and share alike, as may be agreed upon, and the amount of said appraisement shall be paid by the purchaser of the lot to the owner

of the improvements in cash within thirty days after the decision of the committee of appraisement.

SEC. 47. The purchaser of any unimproved town lot sold at public auction shall pay twenty-five per centum of the purchase money at the time of the sale, and within four months thereafter he shall pay twenty-five per centum additional, and the remainder of the purchase money he shall pay in two equal annual installments without interest.

SEC. 48. Such towns in the Cherokee Nation as may have a population of less than two hundred people not otherwise provided for, and which, in the judgment of the Secretary of the Interior, should be set aside as town sites, shall have their limits defined as soon as practicable after the approval of this act in the same manner as provided for other town sites.

SEC. 49. The town authorities of any town site in said Cherokee Nation may select and locate, subject to the approval of the Secretary of the Interior, a cemetery within suitable distance from said town, to embrace such number of acres as may be deemed necessary for such purpose. The town-site commission shall appraise the same at its true value, and the town may purchase the same within one year from the approval of the survey by paying the appraised value. If any citizen have improvements thereon, said improvements shall be appraised by said town-site commission and paid for by the town: *Provided*, That lands already laid out by tribal authorities for cemeteries shall be included in the cemeteries herein provided for without cost to the towns, and the holdings of the burial lots therein now occupied for such purpose shall in no wise be disturbed: *And provided further*, That any park laid out and surveyed in any town shall be duly ap-

praised at a fair valuation, and the inhabitants of said town shall, within one year after the approval of the survey and the appraisement of said part by the Secretary of the Interior, pay the appraised value to the proper officer for the benefit of the tribe.

SEC. 50. The United States shall pay all expenses incident to surveying, platting, and disposition of town lots, and all allotments of lands made under the provisions of this plan of allotment, except where the town authorities may have been or may be duly authorized to survey and plat their respective towns at the expense of such towns.

SEC. 51. No taxes shall be assessed by any town government against any town lot remaining unsold, but taxes may be assessed against any town lot sold as herein provided.

SEC. 52. If the purchaser of any town lot fail to make payment of any sum when due, the same shall thereafter bear six per centum interest per annum until paid.

SEC. 53. All lots or parts of lots, not exceeding fifty by one hundred and fifty feet in size, upon which church houses and parsonages have been erected, and which are occupied as such at the time of the appraisement, shall be conveyed gratuitously to the churches to which such improvements belong, and if such churches have inclosed other adjoining lots actually necessary for their use, they may purchase the same by paying the appraised value thereof.

SEC. 54. Whenever the chief executive of the Cherokee Nation fails or refuses to appoint a town-site commissioner for any town, or to fill any vacancy caused by the neglect or refusal of the town-site commission-

ers appointed by the chief executive to qualify or act, or otherwise, the Secretary of the Interior, in his discretion, may appoint a commissioner to fill the vacancy thus created.

SEC. 55. The purchaser of any town lot may at any time pay the full amount of the purchase money, and he shall thereupon receive title therefor.

SEC. 56. Any person may bid for and purchase any lot sold at public auction as herein provided.

SEC. 57. The United States may purchase in any town in the Cherokee Nation suitable lands for courthouses, jails, or other necessary public purposes for its use by paying the appraised value thereof, the same to be selected under the direction of the department for whose use such lands are needed, and if any person have improvements thereon, the same shall be appraised in like manner as other town property, and shall be paid for by the United States.

TITLES.

SEC. 58. The Secretary of the Interior shall furnish the principal chief with blank patents necessary for all conveyances herein provided for, and when any citizen receives his allotment of land, or when any allotment has been so ascertained and fixed that title should under the provisions of this act be conveyed, the principal chief shall thereupon proceed to execute and deliver to him a patent conveying all the right, title, and interest of the Cherokee Nation, and of all other citizens in and to the lands embraced in his allotment certificate.

SEC. 59. All conveyances shall be approved by the Secretary of the Interior, which shall serve as a relinquishment to the grantee of all the right, title, and

interest of the United States in and to the lands embraced in his patent.

SEC. 60. Any allottee accepting such patent shall be deemed to assent to the allotment and conveyance of all lands of the tribe as provided in this act, and to relinquish all his right, title and interest to the same, except in the proceeds of lands reserved from allotment.

SEC. 61. The acceptance of patents for minors and incompetents by persons authorized to select their allotments for them shall be deemed sufficient to bind such minors and incompetents as to the conveyance of all other lands of the tribe.

SEC. 62. All patents, when so executed and approved, shall be filed in the office of the Dawes Commission, and recorded in a book provided for the purpose, until such time as Congress shall make other suitable provision for record of land titles, without expense to the grantee, and such records shall have like effect as other public records.

MISCELLANEOUS.

SEC. 63. The tribal government of the Cherokee Nation shall not continue longer than March fourth, nineteen hundred and six.

SEC. 64. The collection of all revenues of whatsoever character belonging to the tribe shall be made by an officer appointed by the Secretary of the Interior, under rules and regulations to be prescribed by the said Secretary.

SEC. 65. All things necessary to carry into effect the provisions of this act, not otherwise herein specifically provided for, shall be done under the authority and direction of the Secretary of the Interior.

SEC. 66. All funds of the tribe, and all moneys accruing under the provisions of this act, shall be paid out under the direction of the Secretary of the Interior, and when required for per capita payments shall be paid directly to each individual by an appointed officer of the United States, under the direction of the Secretary of the Interior.

SEC. 67. The Secretary of the Interior shall cause to be paid all just indebtedness of said tribe existing at the date of the ratification of this act which may have lawfully been contracted, and warrants therefor regularly issued upon the several funds of the tribe, as also warrants drawn by authority of law hereafter and prior to the dissolution of the tribal government, such payments to be made from any funds in the United States Treasury belonging to said tribe, and all such indebtedness of the tribe shall be paid in full before any pro rata distribution of the funds of the tribe shall be made. The Secretary of the Interior shall make such payments at the earliest time practicable, and he shall make all needed rules and regulations to carry this provision into effect.

SEC. 68. Jurisdiction is hereby conferred upon the Court of Claims to examine, consider, and adjudicate, with a right of appeal to the Supreme Court of the United States by any party in interest feeling aggrieved at the decision of the Court of Claims, any claim which the Cherokee tribe, or any band thereof, arising under treaty stipulations, may have against the United States, upon which suit shall be instituted within two years after the approval of this act; and also to examine, consider, and adjudicate any claim which the United States may have against said tribe, or any band thereof. The institution, prosecution, or defense, as the case may be, on the part of the tribe or any band, of any such

suit, shall be through attorneys employed and to be compensated in the manner prescribed in sections twenty-one hundred and three to twenty-one hundred and six, both inclusive, of the Revised Statutes of the United States, the tribe acting through its principal chief in the employment of such attorneys, and the band acting through a committee recognized by the Secretary of the Interior. The Court of Claims shall have full authority, by proper orders and process, to make parties to any such suit all persons whose presence in the litigation it may deem necessary or proper to the final determination of the matter in controversy, and any such suit shall, on motion of either party, be advanced on the docket of either of said courts and be determined at the earliest practicable time.

SEC. 69. After the expiration of nine months after the date of the original selection of an allotment by or for any citizen of the Cherokee tribe as provided in this act, no contest shall be instituted against such selection, and as early thereafter as practicable patent shall issue therefor.

SEC. 70. Allotments may be selected and homesteads designated for minors by the father or mother, if citizens, or by guardian, or curator, or the administrator having charge of their estate, in the order named; and for prisoners, convicts, aged and infirm persons, and soldiers and sailors of the United States on duty outside of the Indian Territory, by duly appointed agents under power of attorney; and for incompetents by guardians, curators, or other suitable person akin to them; but it shall be the duty of said Commission to see that said selections are made for the best interests of such parties.

SEC. 71. Any allottee taking as his allotment lands located around the Cherokee National Male Seminary,

the Cherokee National Female Seminary, or Cherokee Orphan Asylum which have not been reserved from allotment as herein provided, and upon which buildings, fences or other property of the Cherokee Nation are located, such buildings, fences, or other property shall be appraised at the true value thereof and be paid for by the allottee taking such lands as his allotment, and the money to be paid into the Treasury of the United States to the credit of the Cherokee Nation.

SEC. 72. Cherokee citizens may rent their allotments when selected for a term not to exceed one year for grazing purposes only, and for a period not to exceed five years for agricultural purposes, but without any stipulation or obligation to renew the same; but leases for a period longer than one year for grazing purposes, and for a period longer than five years for agricultural purposes and for mineral purposes may also be made with the approval of the Secretary of the Interior and not otherwise. Any agreement or lease of any kind or character violative of this section shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity. Cattle grazed upon leased allotments shall not be liable to any tribal tax, but when cattle are introduced into the Cherokee Nation and grazed on lands not selected as allotments by citizens the Secretary of the Interior shall collect from the owners thereof a reasonable grazing tax for the benefit of the tribe, and section twenty-one hundred and seventeen of the Revised Statutes of the United States shall not hereafter apply to Cherokee lands.

SEC. 73. The provisions of section thirteen of the act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, entitled: "An act for the protection of the people of the Indian Territory, and

for other purposes," shall not apply to or in any manner affect the lands or other property of said tribe, and no act of Congress or treaty provision inconsistent with this agreement shall be in force in said nation except sections fourteen and twenty-seven of said last-mentioned act, which shall continue in force as if this agreement had not been made.

SEC. 74. This act shall not take effect or be of any validity until ratified by a majority of the whole number of votes cast by the legal voters of the Cherokee Nation in the manner following:

SEC. 75. The principal chief shall, within ten days after the passage of this act by Congress, make public proclamation that the same shall be voted upon at a special election to be held for that purpose within thirty days thereafter, on a certain date therein named, and he shall appoint such officers and make such other provisions as may be necessary for holding such election. The votes cast at such election shall be forthwith duly certified as required by Cherokee law, and the votes shall be counted by the Cherokee national council, if then in session, and if not in session the principal chief shall convene an extraordinary session for the purpose, in the presence of a member of the Commission to the Five Civilized Tribes, and said member and the principal chief shall jointly make certificate thereof and proclamation of the result and transmit the same to the President of the United States.

Approved, July 1, 1902.

[Appropriation act of March 3, 1903 (32 Stat. L., 982.)]

For salaries of four commissioners appointed under acts of Congress approved March third, eighteen hundred and ninety-three, and March second, eighteen hundred and ninety-five, to negotiate with the Five Civilized Tribes in the Indian Territory, twenty thousand dollars: *Provided*, That said Commission shall exercise all the powers heretofore conferred upon it by Congress.

Expenses of commissioners and necessary expenses of employees, and three dollars per diem for expenses of a clerk detailed as special disbursing agent by the Interior Department while on duty with the Commission, shall be paid therefrom; for clerical help, including secretary of the Commission and interpreters (act of March third, nineteen hundred and one, volume thirty-one, page one thousand and seventy-four, section one), two hundred thousand eight hundred and fifteen dollars; contingent expense of the Commission (same Act) two thousand dollars: *Provided further*, That this appropriation may be used by said Commission in the prosecution of all work to be done by or under its direction as required by law; in all, two hundred and twenty-two thousand eight hundred and fifteen dollars: *And provided further*, That not to exceed ten thousand eight hundred dollars of the above amount may be used in the temporary employment in the office of the Commissioner of Indian Affairs of four clerks, at the rate of one thousand six hundred dollars per annum; one clerk, at the rate of one thousand four hundred dollars, and who shall be competent to examine records in disputed citizenship cases and law contests growing out of the work of said Commission, and in the temporary employment

in said office of three competent stenographers, at the rate of one thousand dollars each per annum.

* * * * * * * * *

For personal and traveling expenses of the three judges of the Choctaw and Chickasaw citizenship court, five thousand dollars, or so much thereof as may be necessary; for one stenographer to each of said judges, to be appointed by them, respectively, at one hundred dollars per month each, three thousand six hundred dollars; for traveling expenses and subsistence of said stenographers, the reporter, and the bailiff of said court, not to exceed three dollars per day each, one thousand five hundred dollars, or so much thereof as may be necessary; in all, ten thousand one hundred dollars, to be immediately available.

The Supreme Court of the United States may transfer to the Choctaw and Chickasaw citizenship court the papers in the cases of Choctaw and Chickasaw citizenship appealed from the United States courts in the Indian Territory to the Supreme Court during the year eighteen hundred and ninety-eight.

That all causes transferred under section thirty-one of the Act of Congress of July first, nineteen hundred and two, entitled "An act to ratify and confirm an agreement with the Choctaw and Chickasaw tribes of Indians, and for other purposes," to the citizenship court for the Choctaw and Chickasaw nations provided in said act shall be tried and determined under the provisions of section thirty-two of said act and disposed of the same as if appealed to such court under the provisions of section thirty-two of the said act: *Provided*, That upon the final determination of cases within the jurisdiction of said citizenship court said court may fix reasonable compensation to the attorneys employed by contract dated January seventeenth, nineteen

hundred and one, with the Choctaw and Chickasaw nations, and such determinations shall be made irrespective of the rate fixed in said contract between said attorneys and said nations, or either of them, unless the same shall have received the approval of the Secretary of the Interior. And upon the final determination of said cases by said citizenship court the Treasurer of the United States is hereby directed to pay to said attorneys on the warrant or warrants drawn by the Secretary of the Interior the amount of such compensation out of any funds in the Treasury belonging to such nations. And the existence of the Choctaw and Chickasaw citizenship court is hereby extended until December thirty-first, nineteen hundred and four.

To pay all expenses incident to the survey, platting, and appraisement of town sites in the Choctaw, Chickasaw, Creek, and Cherokee nations, Indian Territory, as required by sections fifteen and twenty-nine of an act entitled "An act for the protection of the people of the Indian Territory, and for other purposes," approved June twenty-eighth, eighteen hundred and ninety-eight, and all acts amendatory thereof or supplemental thereto, twenty-five thousand dollars: *Provided*, That the money hereby appropriated shall be applied only to the expenses incident to the survey, platting, and appraisement of town sites heretofore set aside and reserved from allotment: *And provided further*, That nothing herein contained shall prevent the survey and platting, at their own expense, of town sites by private parties where stations are located along the lines of railroads, nor the unrestricted alienation of lands for such purposes, when recommended by the Commission to the Five Civilized Tribes and approved by the Secretary of the Interior. That hereafter the Secretary of the Interior may, whenver the chief ex-

ecutive of the Choctaw or Chickasaw nations fails or refuses to appoint a town-site commissioner for any town, or to fill any vacancy caused by the neglect or refusal of the town-site commissioner appointed by the chief executive of the Choctaw or Chickasaw nations to qualify or act, in his discretion, appoint a commissioner to fill the vacancy thus created.

* * * * * * * * *

That the sum of twenty thousand dollars, or so much thereof as is necessary, is hereby appropriated, to be immediately available, for the purpose of aiding indigent and identified full-blood Mississippi Choctaws to remove to the Indian Territory, to be expended at the discretion and under the direction of the Secretary of the Interior.

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SEC. 8. That the tribal government of the Seminole Nation shall not continue longer than March fourth, nineteen hundred and six: *Provided*, That the Secretary of the Interior shall at the proper time furnish the principal chief with blank deeds necessary for all conveyances mentioned in the agreement with the Seminole Nation contained in the act of July first, eighteen hundred and ninety-eight (Thirtieth Statutes, page five hundred and sixty-seven), and said principal chief shall execute and deliver said deeds to the Indian allottees as required by said act, and the deeds for allotment, when duly executed and approved, shall be recorded in the office of the Dawes Commission prior to delivery and without expense to the allottee until further legislation by Congress, and such records shall have like effect as other public records: *Provided further*, That the homestead referred to in said act shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of the deed for the allotment. A

separate deed shall be issued for said homestead, and during the time the same is held by the allottee it shall not be liable for any debt contracted by the owner thereof.

[Act of April 21, 1904 (33 Stat. L., 189).]

AN ACT Making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, nineteen hundred and five, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums be, and they are hereby, appropriated, out of any money in the Treasury not otherwise appropriated, for the purpose of paying the current and contingent expenses of the Indian Department, and in full compensation for all offices the salaries for which are specially provided for herein, for the service of the fiscal year ending June thirtieth, nineteen hundred and five, and for fulfilling treaty stipulations with various Indian tribes, namely:

* * * * * * * * *

To pay such contingent expenses of the Choctaw and Chickasaw citizenship court and such of its officers as the Secretary of the Interior may deem proper, and for rental of quarters, five thousand dollars, to be immediately available. And the unexpended balance of the appropriation for contingent expenses, as provided in the act of July first, nineteen hundred and two, of five thousand dollars remaining on the books of the Interior Department December thirty-first, nineteen hundred and three, amounting to one thousand one hundred and thirty-six dollars and twenty-five cents, to the credit of the Choctaw and Chickasaw citizenship court, is hereby reappropriated for the necessary expenses of the said court until December thirty-first, nineteen hundred and four.

For one stenographer to each of the three judges of

the Choctaw and Chickasaw citizenship court, appointed by them, respectively, at one hundred dollars per month each from March third to June thirtieth, nineteen hundred and three, one thousand one hundred and eighty dollars and sixty-five cents; for traveling expenses and subsistence of said stenographers, the reporter, and the bailiff of said court, not to exceed three dollars per day each, one thousand five hundred dollars; in all, two thousand six hundred and eighty dollars and sixty-five cents, to be immediately available.

* * * * * * * * *

For salaries of four commissioners, appointed under acts of Congress approved March third, eighteen hundred and ninety-three, and March second, eighteen hundred and ninety-five, to negotiate with the Five Civilized Tribes in the Indian Territory, twenty thousand dollars, and said Commission shall conclude its work and terminate on or before the first day of July, nineteen hundred and five, and said Commission shall cease to exist on July first, nineteen hundred and five: *Provided*, That said Commission shall exercise all the powers heretofore conferred upon it by Congress: *And provided further*, That the Secretary of the Interior is hereby granted authority to sell at public sale in tracts not exceeding one hundred and sixty acres to any one purchaser, under rules and regulations to be made by the Secretary of the Interior, the residue of land in the Creek Nation belonging to the Creek tribe of Indians, consisting of about five hundred thousand acres, and being the residue of lands left over after allotments of one hundred and sixty acres to each of said tribe. And all the restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood, except minors, are, except as to homesteads, hereby removed, and all restrictions upon the alienation of all other allottees of

said tribes, except minors, and except as to homesteads, may, with the approval of the Secretary of the Interior, be removed under such rules and regulations as the Secretary of the Interior may prescribe, upon application to the United States Indian agent at the Union Agency in charge of the Five Civilized Tribes, if said agent is satisfied upon a full investigation of each individual case that such removal of restrictions is for the best interest of said allottee. The finding of the United States Indian agent and the approval of the Secretary of the Interior shall be in writing and shall be recorded in the same manner as patents for lands are recorded.

Expenses of Commissioners and necessary expenses of employees; for clerical help, including secretary of the Commission and interpreters, two hundred and forty-two thousand two hundred and ninety-five dollars; contingent expenses of the Commission, three thousand dollars: *Provided further*, That this appropriation may be used by said Commission in the prosecution of all work to be done by or under its direction as required by law; in all, two hundred and sixty-five thousand two hundred and ninety-five dollars.

That no proceedings heretofore had with respect to allotments in the Cherokee Nation shall be held invalid on the ground that they were had before there was authority to begin the work of allotment in said nation: *Provided*, That nothing herein shall be construed as validating any filings heretofore made on lands segregated for the Delaware Indians.

To complete the town-site appraisement and surveys in the Indian Territory under the provisions of the act of June twenty-eighth, eighteen hundred and ninety-eight, twenty-five thousand dollars: *Provided*, That

said work shall be completed on or before July first, nineteen hundred and five.

To carry out the provisions of section ten of the supplemental agreements with the Creek Nation, as ratified by the act of June thirtieth, nineteen hundred and two, and section thirty-seven of the Cherokee agreements as ratified by the act of July first, nineteen hundred and two, ten thousand dollars.

For the purpose of placing allottees in the Indian Territory in possession of their allotments, to be expended under the direction of the Secretary of the Interior, thirty thousand dollars: *Provided*, That no portion of the money herein appropriated for the Indian Territory shall be paid to any person in the service of the United States until such person shall make oath that he has no financial interest with any person or corporation dealing in Indian lands in the Indian Territory.

That the Delaware-Cherokee citizens who have made improvements, or are in rightful possession of such improvements, in the Cherokee Nation at the time of the passage of this act shall have the right to first select from said improved lands their allotments, and thereafter, for a period of six months, shall have the right to sell the improvements upon their surplus holdings of lands to other citizens of the Cherokee Nation entitled to select allotments at a valuation to be approved by an official to be designated by the President for that purpose; and the vendor shall have a lien upon the rents and profits of the land on which the improvements are located for the purchase money remaining unpaid; and the vendor shall have the right to enforce such lien in any court of competent jurisdiction. The vendor may, however, elect to take and retain the possession

of the land at a fair cash rental, to be approved by the official so as aforesaid designated, until such rental shall be sufficient to satisfy the unpaid purchase price, and when the purchase price is fully paid he shall forthwith deliver possession of the land to the purchaser: *Provided, however*, That any crops then growing on the land shall be and remain the property of the vendor, and he may have access to the land so long as may be necessary to cultivate and gather such growing crops. Any such purchaser shall, without unreasonable delay, apply to select as an allotment the land upon which the improvements purchased by him are located, and shall submit with his application satisfactory proof that he has in good faith purchased such improvements.

* * * * * * * * *

That the Secretary of the Interior be, and he is hereby, authorized and directed, upon the sale of lands in Indian Territory covered by coal and asphalt leases, to sell such lands subject to the right of the lessee to use so much of the surface as may be needed for coke ovens, miners' houses, store and supply buildings, and such other structures as are generally used in the production and shipment of coal and coke. Lessees may use the tipples and underground workings located on any lease in the production of coal and coke from adjoining leases, and are hereby authorized to surrender leased premises to the owner thereof on giving sixty days' notice in writing to such owner and paying all charges and royalties due to the date of surrender: *Provided, however*, That nothing herein contained shall release the lessee from the payment of the stipulated royalty so long as such lessee remains in possession of any of the surface of the lands included in his lease for any purpose whatever: *And provided*, That any lessee may remove or dispose of any machinery, tools, or equipment the lessee may have upon the leased lands.

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That the act entitled "An act to refer to the Court of Claims certain claims of the Shawnee and Delaware Indians and the freedmen of the Cherokee Nation, and for other purposes," approved October first, eighteen hundred and ninety, be, and the same is hereby, amended so as to confer upon the Court of Claims the same jurisdiction to determine the claims and rights of those alleged citizens of the Cherokee Nation known as intermarried whites as is therein conferred upon said court relative to the rights and claims of the Shawnee and Delaware Indians and the freedmen of said Cherokee Nation, and said case shall be advanced on the calendar of said Court of Claims and the calendar of the Supreme Court, if the same is appealed. Said court in said judgment shall fix the amount due the attorney or attorneys of record for their legal services, not exceeding the amount stipulated by the contracts between said claimants and said attorneys, and shall in said judgment direct that the accounting officers of the United States shall deduct from the amount due each claimant the attorney fee allowed in said judgment and pay the same directly to said attorneys and shall pay the balance to the claimants.

That the claim of J. Hale Sypher against the Choctaw Nation, for legal and professional services rendered by him to said nation, under an agreement made and entered into between the legally authorized commissioners of said nation and said Sypher on the seventh day of November, eighteen hundred and ninety-one, is hereby referred to the Court of Claims for adjudication; and jurisdiction is hereby conferred upon said court to hear and determine said claim upon the principles of a quantum meruit and without regard to the provisions and requirements of section twenty-one hun-

dred and three of the Revised Statutes; and the said court shall ascertain and determine the character, extent, and value of the services rendered by said Sypher to said nation under said agreement; and the court, having ascertained and determined the amount justly and equitably due and payable from said nation to said Sypher for services renderd by him under said agreement, shall report their findings to the next session of Congress.

All unleased lands which are by section fifty-nine of an act entitled "An act to ratify and confirm an agreement with the Choctaw and Chickasaw tribes of Indians, and for other purposes," approved July 6ʳˢt, nineteen hundred and two, directed to "be sold at public auction for cash," and all other unleased lands and deposits of like character in said nations segregated under any act of Congress, shall, instead, be sold under direction of the Secretary of the Interior in tracts not exceeding nine hundred and sixty acres to each person, after due advertisement, upon sealed proposals, under regulations to be prescribed by the Secretary of the Interior and approved by the President, with authority to reject any or all proposals: *Provided*, That the President shall appoint a commission of three persons, one on the recommendation of the principal chief of the Choctaw Nation, who shall be a Choctaw by blood, and one upon the recommendation of the governor of the Chicakasaw Nation, who shall be a Chickasaw by blood, which commission shall have a right to be present at the time of the opening of bids and be heard in relation to the acceptance or rejection thereof.

All expense, inclusive of necessary clerical help in the Department of the Interior, connected with and incident to such sale shall be paid from the funds of the Choctaw and Chickasaw tribes on deposit in the Treas-

ury of the United States: *Provided,* That all leased lands shall be withheld from sale until the further direction of Congress.

[Act of April 28, 1904 (33 Stat. L., 544).]

AN ACT To authorize the Secretary of the Interior to add to the segregation of coal and asphalt lands in the Choctaw and Chickasaw nations, Indian Territory, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior is hereby authorized and empowered to segregate and reserve from allotment, and to cancel any filings or applications that may heretofore have been made with a view to allotting the following-described lands, situate in the Choctaw Nation, to-wit: The north half of the south half of the southeast quarter, and the northeast quarter of the southeast quarter of the southwest quarter of section nine; the north half of the south half of section ten; the north half of the south half of the south half of section eleven, and the north half of the south half of the southwest quarter of section twelve, all in township five north, range nineteen east, containing two hundred and fifty acres, more or less; and the northwest quarter of the southwest quarter of section eight, township five north, range nineteen east, and the southwest quarter of the northeast quarter of section seven, township five north, range nineteen east, containing eighty acres, more or less.

SEC. 2. That the provisions of sections fifty-six to sixty-three, inclusive, of the act of Congress approved July first, nineteen hundred and two, entitled "An act to ratify and confirm an agreement with the Choctaw and Chickasaw tribes, and for other purposes," be, and the same are hereby, made applicable to the lands above described, the same as if the said described lands had

been made a part of the segregation, as contemplated by said sections fifty-six to sixty-three, inclusive, of said above act approved July first, nineteen hundred and two: *Provided*, That the Secretary of the Interior may, in his discretion, add said lands to and make them a part of the coal and asphalt mining leases now in effect, and to which said lands above described are contiguous, the lands in each case to be added to and made a part of the lease to which they are adjacent and which they join, Government subdivisions being followed as nearly as possible: *Provided further*, That the holder or holders of the lease or leases to which such lands shall be added shall, before the same are added, pay the Indian or Indians who have filed upon or applied for such lands as their allotments, or who are in possession thereof, the value of the improvements placed on the land by said Indian or Indians, such value to be determined under the direction of the Secretary of the Interior: *And provided further*, That said lands shall be sold as other leased coal and asphalt lands in the Choctaw and Chickasaw nations in the Indian Territory are sold.

SEC. 3. That the Choctaw, Oklahoma and Gulf Railroad Company is hereby authorized and empowered to sublet, assign, transfer, and set over the leases which it now has upon coal lands in Choctaw Nation, Indian Territory, or any of them. The assignees or sublessees of said Choctaw, Oklahoma and Gulf Railroad Company shall file good and sufficient bonds for the faithful performance of the terms of the original leases, to be approved by the Secretary of the Interior.

Approved, April 28, 1904.

JOINT RESOLUTION Extending the tribal existence and government of the Five Civilized Tribes of Indians in the Indian Territory.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations of Indians in the Indian Territory are hereby continued in full force and effect for all purposes under existing laws until all property of such tribes, or the proceeds thereof, shall be distributed among the individual members of said tribes unless hereafter otherwise provided by law.

Approved, March 2, 1906.

AN ACT To provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That after the approval of this Act no person shall be enrolled as a citizen or freedman of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes of Indians in the Indian Territory, except as herein otherwise provided, unless application for enrollment was made prior to December first, nineteen hundred and five, and the records in charge of the Commissioner to the Five Civilized Tribes shall be conclusive evidence as to the fact of such application; and no motion to reopen or reconsider any citizenship case, in any of said tribes, shall be entertained unless filed with the Commissioner to the Five Civilized Tribes within sixty days after the date of the order or decision sought to be reconsidered except as to decisions made prior to the passage of this Act, in which cases such motion shall be made within sixty days after the passage of this Act: *Provided*, That the Secretary of the Interior may enroll persons whose names appear upon any of the tribal rolls and for whom the records in charge of the Commission to the Five Civilized Tribes show application was made prior to December first, nineteen hundred and five, and which was not allowed solely because not made within the time prescribed by law.

SEC. 2. That for ninety days after approval hereof applications shall be received for enrollment of children who were minors living March fourth, nineteen hundred and six, whose parents have been enrolled as members of the Choctaw, Chickasaw, Cherokee, or

Creek tribes, or have applications for enrollment pending at the approval hereof, and for the purpose of enrollment under this section illegitimate children shall take the status of the mother, and allotments may be made to children so enrolled. If any citizen of the Cherokee tribe shall fail to receive the full quantity of land to which he is entitled as an allotment, he shall be paid out of any of the funds of such tribe a sum equal to twice the appraised value of the amount of land thus deficient. The provisions of section nine of the Creek agreement ratified by Act approved March first, nineteen hundred and one, authorizing the use of funds of the Creek tribe for equalizing allotments, are hereby restored and re-enacted, and after the expiration of nine months from the date of the original selection of an allotment of land in the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes, and after the expiration of six months from the passage of this Act as to allotments heretofore made, no contest shall be instituted against such allotment: *Provided*, That the rolls of the tribes affected by this Act shall be fully completed on or before the fourth day of March, nineteen hundred and seven, and the Secretary of the Interior shall have no jurisdiction to approve the enrollment of any person after said date: *Provided further*, That nothing herein shall be construed so as to hereafter permit any person to file an application for enrollment in any tribe where the date for filing application has been fixed by agreement between said tribe and the United States: *Provided*, That nothing herein shall apply to the intermarried whites in the Cherokee Nation, whose cases are now pending in the Supreme Court of the United States.

SEC. 3. That the approved roll of Creek freedmen shall include only those persons whose names appear

on the roll prepared by J. W. Dunn, under authority of the United States prior to March fourteenth, eighteen hundred and sixty-seven, and their descendants born since said roll was made, and those lawfully admitted to citizenship in the Creek Nation subsequent to the date of the preparation of said roll, and their descendants born since such admission, except such, if any, as have heretofore been enrolled and their enrollment approved by the Secretary of the Interior.

The roll of Cherokee Freedmen shall include only such persons of African descent, either free colored or the slaves of Cherokee citizens and their descendants, who were actual personal bona fide residents of the Cherokee Nation August eleventh, eighteen hundred and sixty-six, or who actually returned and established such residence in the Cherokee Nation on or before February eleventh, eighteen hundred and sixty-seven; but this provision shall not prevent the enrollment of any person who has heretofore made application to the Commission to the Five Civilized Tribes or its successor and has been adjudged entitled to enrollment by the Secretary of the Interior.

Lands allotted to freedmen of the Choctaw and Chickasaw tribes shall be considered "homesteads," and shall be subject to all the provisions of this or any other Act of Congress applicable to homesteads of citizens of the Choctaw and Chickasaw tribe.

SEC. 4. That no name shall be transferred from the approved freedmen, or any other approved rolls of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes, respectively, to the roll of citizens by blood, unless the records in charge of the Commissioner to the Five Civilized Tribes show that application for enrollment as a citizen of the blood was made within the time

prescribed by law or for the party seeking the transfer, and said records shall be conclusive evidence as to the fact of such application, unless it be shown by documentary evidence that the Commission to the Five Civilized Tribes actually received such application within the time prescribed by law.

SEC. 5. That all patents or deeds to allottees in any of the Five Civilized Tribes to be hereafter issued shall issue in the name of the allottee, and if any such allottee shall die before such patent or deed becomes effective, the title to the lands described therein shall inure to and vest in his heirs, and in case any allottee shall die after restrictions have been removed, his property shall descend to his heirs or his lawful assigns, as if the patent or deed had issued to the allottee during his life, and all patents heretofore issued where the allottee died before the same became effective, shall be given like effect; and all patents or deeds to allottees and other conveyances affecting lands of any of said tribes shall be recorded in the office of the Commissioner to the Five Civilized Tribes, and when so recorded shall convey legal title, and shall be delivered under the direction of the Secretary of the Interior to the party entitled to receive the same: *Provided*, The provisions of this section shall not affect any rights involved in contests pending before the Commissioner to the Five Civilized Tribes or the Department of the Interior at the date of the approval of this Act.

SEC. 6. That if the principal chief of the Choctaw, Cherokee, Creek, or Seminole tribe, or the governor of the Chickasaw tribe shall refuse or neglect to perform the duties devolving upon him, he may be removed from office by the President of the United States, or if any such executive become permanently disabled, the office may be declared vacant by the President of the

United States, who may fill any vacancy arising from removal, disability or death of the incumbent, by appointment of a citizen by blood of the tribe.

If any such executive shall fail, refuse or neglect, for thirty days after notice that any instrument is ready for his signature, to appear at a place to be designated by the Secretary of the Interior and execute the same, such instrument may be approved by the Secretary of the Interior without such execution, and when so approved and recorded shall convey legal title, and such approval shall be conclusive evidence that such executive or chief refused or neglected after notice to execute such instrument.

Provided, That the principal chief of the Seminole Nation is hereby authorized to execute the deeds to allottees in the Seminole Nation prior to the time when the Seminole government shall cease to exist.

SEC. 7. That the Secretary of the Interior shall, by written order, within ninety days from the passage of this Act, segregate and reserve from allotment sections one, two, three, four, five, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, the east half of section sixteen, and the northeast quarter of section six, in township nine south, range twenty-six east, and sections five, six, seven, eight, seventeen, eighteen, and the west half of section sixteen, in township nine south, range twenty-seven east, Choctaw Nation, Indian Territory, except such portions of said lands upon which substantial, permanent, and valuable improvements were erected and placed prior to the passage of this Act and not for speculation, but by members and freedmen of the tribes actually themselves and for themselves for allotment purposes, and where such identical members or freedmen of said tribes now desire to select same as portions of

their allotments, and the action of the Secretary of the Interior in making such segregation shall be conclusive. The Secretary of the Interior shall also cause to be estimated and appraised the standing pine timber on all of said land, and the land segregated shall not be allotted, except as hereinbefore provided, to any member or freedman of the Choctaw and Chickasaw tribes. Said segregated land and the pine timber thereon shall be sold and disposed of at public auction, or by sealed bids for cash, under the direction of the Secretary of the Interior.

SEC. 8. That the records of each of the land offices in the Indian Territory, should such office be hereafter discontinued, shall be transferred and kept in the office of the clerk of the United States court in whose district said records are now located. The officer having custody of any of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes, and the disposition of the land and other property of said tribes, upon proper application and payment of such fees as the Secretary of the Interior may prescribe, may make certified copies of such records, which shall be evidence equally with the originals thereof; but fees shall not be demanded for such authenticated copies as may be required by officers of any branch of the Government nor for such unverified copies as such officer, in his discretion, may deem proper to furnish. Such fees shall be paid to bonded officers or employees of the Government, designated by the Secretary of the Interior, and the same or so much thereof as may be necessary may be expended under the direction of the Secretary of the Interior for the purposes of this section, and any unexpended, balance shall be deposited in the Treasury of the United States, as are other public moneys.

SEC. 9. The disbursements, in the sum of one hundred and eighty-six thousand dollars, to and on account of the loyal Seminole Indians, by James E. Jenkins, special agent appointed by the Secretary of the Interior, and by A. J. Brown as administrator de bonis non, under an Act of Congress approved May thirty-first, nineteen hundred, appropriating said sum, be, and the same are hereby ratified and confirmed: *Provided*, That this shall not prevent any individual from bringing suit in his own behalf to recover any sum really due him.

That the Court of Claims is hereby authorized and directed to hear, consider, and adjudicate the claims against the Mississippi Choctaws of the estate of Charles F. Winton, deceased, his associates and assigns, for services rendered and expenses incurred in the matter of claims of the Mississippi Choctaws to citizenship in the Choctaw Nation, and to render judgment thereon on the principle of quantum meruit, in such amount or amounts as may appear equitable or justly due therefor, which judgment, if any, shall be paid from any funds now or hereafter due such Choctaws by the United States. Notice of such suit shall be served on the governor of the Choctaw Nation, and the Attorney-General shall appear and defend the said suit on behalf of said Choctaws.

SEC. 10. That the Secretary of the Interior is hereby authorized and directed to assume control and direction of the schools in the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes, with the lands and all school property pertaining thereto, March fifth, nineteen hundred and six, and to conduct such schools under rules and regulations to be prescribed by him, retaining tribal educational officers, subject to dismissal by the Secretary of the Interior, and the present

system so far as practicable, until such time as a public school system shall have been established under Territorial or State government, and proper provision made thereunder for the education of the Indian children of said tribes, and he is hereby authorized and directed to set aside a sufficient amount of any funds, invested or otherwise, in the Treasury of the United States, belonging to said tribes, including the royalties on coal and asphalt in the Choctaw and Chickasaw nations, to defray all the necessary expenses of said schools, using, however, only such portion of said funds of each tribe as may be requisite for the schools of that tribe, not exceeding in any one year for the respective tribes the amount expended for the scholastic year ending June thirtieth, nineteen hundred and five; and he is further authorized and directed to use the remainder, if any, of the funds appropriated by the Act of Congress approved March third, nineteen hundred and five, "for the maintenance, strengthening, and enlarging of the tribal schools of the Cherokee, Creek, Choctaw, Chickasaw, and Seminole nations," unexpended March fourth, nineteen hundred and six, including such fees as have accrued or may hereafter accrue under the Act of Congress approved February nineteenth, nineteen hundred and three, Statutes at Large, volume thirty-two, page eight hundred and forty-one, which fees are hereby appropriated, in continuing such schools as may have been established, and in establishing such new schools as he may direct, and any of the tribal funds so set aside remaining unexpended when a public school system under a future State or Territorial government has been established, shall be distributed per capita among the citizens of the nations, in the same manner as other funds.

SEC. 11 That all revenues of whatever character accruing to the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes, whether before or after dissolution of the tribal governments, shall, after the approval hereof, be collected by an officer appointed by the Secretary of the Interior under rules and regulations to be prescribed by him; and he shall cause to be paid all lawful claims against said tribes which may have been contracted after July first, nineteen hundred and two, or for which warrants have been regularly issued, such payments to be made from any funds in the United States Treasury belonging to said tribes. All such claims arising before dissolution of the tribal governments shall be presented to the Secretary of the Interior within six months after such dissolution, and he shall make all rules and regulations necessary to carry this provision into effect and shall pay all expenses incident to the investigation of the validity of such claims or indebtedness out of the tribal funds: *Provided*, That all taxes accruing under tribal laws or regulations of the Secretary of the Interior shall be abolished from and after December thirty-first, nineteen hundrd and five, but this provision shall not prevent the collection after that date nor after dissolution of the tribal government of all such taxes due up to and including December thirty-first, nineteen hundred and five, and all such taxes levied and collected after the thirty-first day of December, nineteen hundred and five, shall be refunded.

Upon dissolution of the tribal governments, every officer, member, or representative of said tribes, respectively, having in his possession, custody, or control any money or other property of any tribe shall make full and true account and report thereof to the Secretary of the Interior, and shall pay all money of the

tribe in his possession, custody, or control, and shall deliver all other tribal property so held by him, to the Secretary of the Interior, and if any person shall willfully and fraudulently fail to account for all such money and property so held by him, or pay to and deliver the same as herein provided for sixty days from dissolution of the tribal government, he shall be deemed guilty of embezzlement and upon conviction thereof shall be punished by a fine of not exceeding five thousand dollars or by imprisonment not exceeding five years, or by both such fine and imprisonment, according to the laws of the United States relating to such offense, and shall be liable in civil proceedings to be prosecuted in behalf of and in the name of the tribe for the amount or value of the money or property so withheld.

SEC. 12. That the Secretary of the Interior is authorized to sell, upon such terms and under such rules and regulations as he may prescribe, all lots in towns in the Choctaw and Chickasaw nations reserved from appraisement and sale for use in connection with the operation of coal and asphalt mining leases or for the occupancy of miners actually engaged in working for lessees operating coal and asphalt mines, the proceeds arising from such sale to be deposited in the Treasury of the United States as are other funds of said tribes.

If the purchaser of any town lot sold under the provisions of law regarding the sale of town sites in the Choctaw, Chickasaw, Cherokee, Creek or Seminole nations fail for sixty days after approval hereof to pay the purchase price or any installment thereof then due, or shall fail for thirty days to pay the purchase price or any installment thereof falling due hereafter, he shall forfeit all rights under his purchase, together with all money paid thereunder, and the Secretary of the Interior may cause the lots upon which such forfeiture is

made to be resold at public auction for cash, under such rules and regulations as he may prescribe. All municipal corporations in the Indian Territory are hereby authorized to vacate streets and alleys, or parts thereof, and said streets and alleys, when vacated, shall revert to and become the property of the abutting property owners.

SEC. 13. That all coal and asphalt lands whether leased or unleased shall be reserved from sale under this Act until the existing leases for coal and asphalt lands shall have expired or until such time as may be otherwise provided by law.

SEC. 14. That the lands in the Choctaw, Chickasaw, Cherokee, Creek, and Seminole nations reserved from allotment or sale under any Act of Congress for the use or benefit of any person, corporation, or organization shall be conveyed to the person, corporation, or organization entitled thereto: *Provided*, That if any tract or parcel thus reserved shall before conveyance thereof be abandoned for the use for which it was reserved by the party in whose interest the reservation was made, such tract or parcel shall revert to the tribe and be disposed of as other surplus lands thereof: *Provided further*, That this section shall not apply to land reserved from allotment because of the right of any railroad or railway company therein in the nature of an easement for right of way, depot, station grounds, water stations, stock yards or other uses connected with the maintenance and operation of such company's railroad, title to which tracts may be acquired by the railroad or railway company under rules and regulations to be prescribed by the Secretary of the Interior at a valuation to be determined by him; but if any such company shall fail to make payment within the time prescribed by the regulations or shall cease to use such

land for the purpose for which it was reserved, title thereto shall thereupon vest in the owner of the legal subdivision of which the land so abandoned is a part, except lands within a municipality the title of which, upon abandonment, shall vest in such municipality.

The principal chief of the Choctaw Nation and the governor of the Chickasaw Nation are, with the approval of the Secretary of the Interior, hereby authorized and directed to issue patents to the Murrow Indian Orphans' Home, a corporation of Atoka, Indian Territory, in all cases where tracts have been allotted under the direction of the Secretary of the Interior for the purpose of allowing the allottees to donate the tract so allotted to said Murrow Indian Orphans' Home.

In all cases where enrolled citizens of either the Choctaw or Chickasaw tribe have taken their homestead and surplus allotment and have remaining over an unallotted right to less than ten dollars on the basis of the allotment value of said lands, such unallotted right may be conveyed by the owners thereof to the Murrow Indian Orphans' Home aforesaid; and whenever said conveyed rights shall amount in the aggregate to as much as ten acres of average allottable land, land to represent the same shall be allotted to the said Murrow Indian Orphans' Home, and certificate and patent shall issue therefor to said Murrow Indian Orphans' Home.

And there is hereby authorized to be conveyed to said Murrow Indian Orphans' Home, in the manner hereinbefore prescribed for the conveyance of land, the following-described lands in the Choctaw and Chickasaw nations, to-wit: Sections eighteen and nineteen in township two north, range twelve east; the south half of the northeast quarter, the northeast quarter of the northeast quarter, the south half of the northwest quar-

ter of the northeast quarter, the south half of the southeast quarter, the northeast quarter of the southeast quarter, the south half of the northwest quarter of the southeast quarter, the northeast quarter of the northwest quarter of the southeast quarter, the northeast quarter of the southeast quarter of the southwest quarter, and the northwest quarter of the northwest quarter of section twenty-four, and the northwest quarter of the southeast quarter, the north half of the southwest quarter of the southeast quarter, the south half of the southwest quarter of the southwest quarter, the northeast quarter of the southwest quarter of the southwest quarter, and the southeast quarter of the northwest quarter of the southwest quarter of section twenty-three, and the southwest quarter of the southwest quarter of the southeast quarter of section twenty-six, and the southeast quarter of the northwest quarter of the northwest quarter, the south half of the northeast quarter of the northwest quarter, the northeast quarter of the northeast quarter of the northwest quarter, and the east half of the southeast quarter of the northwest quarter of section twenty-five, all in township two north, range eleven east, containing one thousand seven hundred and ninety acres, as shown by the government survey, for the purpose of the said Home.

SEC. 15. The Secretary of the Interior shall take possession of all buildings now or heretofore used for governmental, school, and other tribal purposes, together with the furniture therein and the land appertaining thereto, and appraise and sell the same at such time and under such rules and regulations as he may prescribe, and deposit the proceeds, less expenses incident to the appraisement and sale, in the Treasury of the United States to the credit of the respective tribes: *Provided*, That in the event said lands are embraced

within the geographical limits of a State or Territory of the United States such State or Territory or any county or municipality therein shall be allowed one year from date of establishment of said State or Territory within which to purchase any such lands and improvements within their respective limits at not less than the appraised value. Conveyances of lands disposed of under this section shall be executed, recorded, and delivered in like manner and with like effect as herein provided for other conveyances.

SEC. 16. That when allotments as provided by this and other Acts of Congress have been made to all members and freedmen of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes, the residue of lands in each of said nations not reserved or otherwise disposed of shall be sold by the Secretary of the Interior under rules and regulations to be prescribed by him and the proceeds of such sales deposited in the United States Treasury to the credit of the respective tribes. In the disposition of the unallotted lands of the Choctaw and Chickasaw nations each Choctaw and Chickasaw freedmen shall be entitled to a preference right, under such rules and regulations as the Secretary of the Interior may prescribe, to purchase at the appraised value enough land to equal with that already allotted to him forty acres in area. If any such purchaser fails to make payment within the time prescribed by said rules and regulations, then such tract or parcel of land shall revert to the said Indian tribes and be sold as other surplus lands thereof. The Secretary of the Interior is hereby authorized to sell whenever in his judgment it may be desirable, any of the unallotted land in the Choctaw and Chickasaw nations, which is not principally valuable for mining, agricultural, or timber purposes, in tracts of not exceeding six hundred and

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forty acres to any one person, for a fair and reasonable price, not less than the present appraised value. Conveyances of lands sold under the provisions of this section shall be executed, recorded and delivered in like manner and with like effect as herein provided for other conveyances: *Provided further*, That agricultural lands shall be sold in tracts of not exceeding one hundred and sixty acres to any one person.

SEC. 17. That when the unallotted lands and other property belonging to the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes of Indians have been sold and the moneys arising from such sales or from any other source whatever have been paid into the United States Treasury to the credit of said tribes, respectively, and when all the just charges against the funds of the respective tribes have been deducted therefrom, any remaining funds shall be distributed per capita to the members then living and the heirs of deceased members whose names appear upon the finally approved rolls of the respective tribes, such distribution to be made under rules and regulations to be prescribed by the Secretary of the Interior.

SEC. 18. That the Secretary of the Interior is hereby authorized to bring suit in the name of the United States, for the use of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes, respectively, either before or after the dissolution of the tribal governments, for the collection of any moneys or recovery of any land claimed by any of said tribes, whether such claim shall arise prior to or after the dissolution of the tribal governments, and the United States courts in Indian Territory are hereby given jurisdiction to try and determine all such suits, and the Secretary of the Interior is authorized to pay from the funds of the tribe interested any costs and necessary expenses incurred in maintaining

and prosecuting such suits: *Provided*, That proceedings to which any of said tribes is a party pending before any court or tribunal at the date of dissolution of the tribal governments shall not be thereby abated or in anywise affected, but shall proceed to final disposition.

Where suit is now pending, or may hereafter be filed in any United States court in the Indian Territory, by or on behalf of any one or more of the Five Civilized Tribes to recover moneys claimed to be due and owing to such tribe, the party defendants to such suit shall have the right to set up and have adjudicated any claim it may have against such tribe; and any balance that may be found due by any tribe or tribes shall be paid by the Treasurer of the United States out of any funds of such tribe or tribes upon the filing of the decree of the court with him.

SEC. 19. That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes shall have power to alienate, sell, dispose of, or encumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this Act, unless such restriction shall, prior to the expiration of said period, be removed by Act of Congress; and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior: *Provided, however*, That such full-blood Indians of any of said tribes may lease any lands other than homesteads for more than one year under such rules and regulations as may be prescribed by the Secretary of the Interior; and in case of the inability of any full-blood owner of a homestead, on account of infirmity or age, to work or farm his homestead, the Secretary of the Interior, upon

proof of such inability, may authorize the leasing of such homestead under such rules and regulations: *Provided further*, That conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to the selection of allotment and subsequent to removal of restriction, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed; but this shall not be held or construed as affecting the validity or invalidity of any such conveyance, except as hereinabove provided; and every deed executed before, or for the making of which a contract or agreement was entered into before the removal of restrictions, be and the same is hereby, declared void: *Provided further*, That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee.

SEC. 20. That after the approval of this Act all leases and rental contracts, except leases and rental contracts for not exceeding one year for agricultural purposes for lands other than homesteads, of full-blood allottees of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes shall be in writing and subject to approval by the Secretary of the Interior and shall be absolutely void and of no effect without such approval: *Provided*, That allotments of minors and incompetents may be rented or leased under order of the proper court: *Provided, further*, That all leases entered into for a period of more than one year shall be recorded in conformity to the law applicable to recording instruments now in force in said Indian Territory.

SEC. 21. That if any allottee of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes die intestate without widow, heir or heirs, or surviving spouse, seized

of all or any portion of his allotment prior to the final distribution of the tribal property, and such fact shall be known by the Secretary of the Interior, the lands allotted to him shall revert to the tribe and be disposed of as herein provided for surplus lands; but if the death of such allottee be not known by the Secretary of the Interior before final distribution of the tribal property, the land shall escheat to and vest in such State or Territory as may be formed to include said lands. That heirs of deceased Mississippi Choctaws who died before making proof of removal to and settlement in the Choctaw country and within the period prescribed by law for making such proof may within sixty days from the passage of this Act appear before the Commission to the Five Civilized Tribes and make such proof as would be required if made by such deceased Mississippi Choctaws; and the decision of the Commissioner to the Five Civilized Tribes shall be final therein, and no appeal therefrom shall be allowed.

SEC. 22. That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States court for the Indian Territory. And in case of the organization of a State or Territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval

of the Secretary of the Interior, under such rules and regulations as he may prescribe.

SEC. 23. Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: *Provided*, That no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a judge of the United States court for the Indian Territory, or a United States commissioner.

SEC. 24. That in the Choctaw, Chickasaw, and Seminole nations public highways or roads two rods in width, being one rod on each side of the section line, may be established on all section lines; and all allottees, purchasers, and others shall take title to such land subject to this provision, and if buildings or other improvements are damaged in consequence of the establishment of such public highways or roads, such damages accruing prior to the inauguration of a State government shall be determined under the direction of the Secretary of the Interior and be paid for from the funds of said tribes, respectively.

All expenses incident to the establishment of public highways or roads in the Creek, Cherokee, Choctaw, Chickasaw, and Seminole nations, including clerical hire, per diem, salary, and expenses of viewers, appraisers, and others, shall be paid under the direction of the Secretary of the Interior from the funds of the tribe or nation in which such public highways or roads are established. Any person, firm, or corporation obstructing any public highway or road, and who shall fail, neglect, or refuse for a period of ten days after notice

to remove or cause to be removed any and all obstructions from such public highway or road, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not exceeding ten dollars per day for each and every day in excess of said ten days which said obstruction is permitted to remain: *Provided, however*, That notice of the establishment of public highways or roads need not be given to allottees or others, except in cases where such public highways or roads are obstructed, and every person obstructing any such public highway or road, as aforesaid, shall also be liable in a civil action for all damages sustained by any person who has in any manner whatever been damaged by reason of such obstruction.

SEC. 25. That any light, or power company doing business within the limits of the Indian Territory, in compliance with the laws of the United States that are now or may be in force therein, be, and the same are hereby, invested and empowered with the right of locating, constructing, owning, operating, using, and maintaining canals, reservoirs, auxiliary steam works, and a dam or dams across any non-navigable stream within the limits of said Indian Territory, for the purpose of obtaining a sufficient supply of water to manufacture and generate water, electric, or other power, light, and heat and to utilize and transmit and distribute such power, light, and heat to other places for its own use or other individuals or corporations, and the right of locating, constructing, owning, operating, equipping, using, and maintaining the necessary pole lines and conduits for the purpose of transmitting and distributing such power, light, and heat to other places within the limits of said Indian Territory.

That the right to locate, construct, own, operate, use, and maintain such dams, canals, reservoirs, auxiliary

steam works, pole lines, and conduits in or through the Indian Territory, together with the right to acquire, by condemnation, purchase or agreement between the parties, such land as it may deem necessary for the locating, constructing, owning, operating, using, and maintaining of such dams, canals, reservoirs, auxiliary steam works, pole lines, and conduits in or through any land held by any Indian tribe or nation, person, individual, corporation, or municipality in said Indian Territory, or in or through any lands in said Indian Territory which have been or may hereafter be allotted in severalty to any individual Indian or other person under any law or treaty, whether the same have or have not been conveyed to the allottee, with full power of alienation, is hereby granted to any company complying with the provisions of this Act: *Provided*, That the purchase from and agreements with individual Indians, where the right of alienation has not theretofore been granted by law, shall be subject to approval by the Secretary of the Interior.

In case of the failure of any light, or power company to make amicable settlement with any individual owner, occupant, allottee, tribe, nation, corporation, or municipality for any lands or improvements sought to be condemned or appropriated under this Act all compensation and damages to be paid to the dissenting individual owner, occupant, allottee, tribe, nation, corporation, or municipality by reason of the appropriation and condemnation of said lands and improvements shall be determined as provided in sections fifteen and seventeen of an Act of Congress entitled "An act to grant a right of way through Oklahoma Territory and the Indian Territory to the Enid and Anadarko Railway Company, and for other purposes," approved February twenty-eighth, nineteen hundred and two (Public Numbered

Twenty-six), and all such proceedings hereunder shall conform to said sections, except that sections three and four of said Act shall have no application, and except that hereafter the plats required to be filed by said Act shall be filed with the Secretary of the Interior and with the Commissioner to the Five Civilized Tribes, and where the words "Principal Chief or Governor" of any tribe or nation occur in said Act, for the purpose of this Act there is inserted the words Commissioner to the Five Civilized Tribes. Whenever any such dam or dams, canals, reservoirs, and auxiliary steam works, pole lines, and conduits are to be constructed within the limits of any incorporated city or town in the Indian Territory, the municipal authorities of such city or town shall have the power to regulate the manner of construction therein, and nothing herein contained shall be so construed as to deny the right of municipal taxation in such cities and towns: *Provided*, That all rights granted hereunder shall be subject to the control of the future Territory or State within which the Indian Territory may be situated.

SEC. 26. That in addition to the powers now conferred by law, all municipalities in the Indian Territory having a population of over two thousand to be determined by the last census taken under any provision of law or ordinance of the council of such municipality, are hereby authorized and empowered to order improvements of the streets or alleys or such parts thereof as may be included in an ordinance or order of the common council with the consent of a majority of the property owners whose property as herein provided is liable to assessment therefor for the proposed improvement; and said council is empowered and authorized to make assessments and levy taxes with the consent of a majority of the property owners whose property is assessed, for

the purpose of grading, paving, macadamizing, curbing, or guttering streets and alleys, or building sidewalks upon and along any street, roadway or alley within the limits of such municipality, and the cost of such grading, paving, macadamizing, curbing, guttering or sidewalk constructed, or other improvements under authority of this section, shall be so assessed against the abutting property as to require each parcel of land to bear the cost of such grading, paving, macadamizing, curbing, guttering or sidewalk, as far as it abuts thereon, and in the case of streets or alleys to the center thereof; and the cost of street intersections or crossings may be borne by the city or apportioned to the quarter blocks abutting thereon upon the same basis. The special assessments provided for by this section and the amount to be charged against each lot or parcel of land shall be fixed by the city council or under its authority and shall become a lien on such abutting property, which may be enforced as other taxes are enforced under the laws in force in the Indian Territory. The total amount charged against any tract or parcel of land shall not exceed twenty per centum of its assessed value, and there shall not be required to be paid thereon exceeding one per centum per annum on the assessed value and interest at six per centum on the deferred payments.

For the purpose of paying for such improvements the city council of such municipality is hereby authorized to issue improvement script or certificates for the amount due for such improvements, said script or certificates to be payable in annual installments and to bear interest from date at the rate of six per centum per annum, but no improvement script shall be issued or sold for less than its par value. All of said municipalities are hereby authorized to pass all ordinances

necessary to carry into effect the above provisions and for the purpose of doing so may divide such municipality into improvement districts.

That the tangible property of railroad corporations (exclusive of rolling stock) located within the corporate limits of incorporated cities and towns in the Indian Territory shall be assessed and taxed in proportion to its value the same as other property is assessed and taxed in such incorporated cities and towns; and all such city or town councils are hereby empowered to pass such ordinances as may be necessary for the assessment, equalization, levy and collection, annually, of a tax on all property except as herein stated within the corporate limits and for carrying the same into effect: *Provided*, That should any person or corporation feel aggrieved by any assessment of property in the Indian Territory, an appeal from such assessment may be taken within sixty days by original petition to be filed in United States court in the district in which such city or town is located, and the question of the amount and legality of such assessment, and the validity of the ordinance under which such assessment is made may be determined by such court and the costs of such proceeding shall be taxed and apportioned between the parties as the court shall find to be just and equitable.

SEC. 27. That the lands belonging to the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes, upon the dissolution of said tribes, shall not become public lands nor property of the United States, but shall be held in trust by the United States for the use and benefit of the Indians respectively comprising each of said tribes, and their heirs as the same shall appear by the rolls as finally concluded as heretofore and hereinafter provided for: *Provided*, That nothing herein contained shall interfere with any allotments heretofore or here-

after made or to be made under the provisions of this or any other Act of Congress.

SEC. 28. That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations are hereby continued in full force and effect for all purposes authorized by law, until otherwise provided by law, but the tribal council or legislature in any of said tribes or nations shall not be in session for a longer period than thirty days in any one year: *Provided*, That no act, ordinance, or resolution (except resolutions of adjournment) of the tribal council or legislature of any of said tribes or nations shall be of any validity until approved by the President of the United States: *Provided further*, That no contract involving the payment or expenditure of any money or affecting any property belonging to any of said tribes or nations made by them or any of them or by any officer thereof, shall be of any validity until approved by the President of the United States.

SEC. 29. That all Acts and parts of Acts inconsistent with the provisions of this Act be, and the same are hereby, repealed.

Approved, April 26, 1906.

EXHIBIT 14

TO THE HONORABLES

HENRY L. DAWES, Chairman;
TAMS BIXBY, Acting Chairman;
CLIFTON R. BRECKENRIDGE,
THOMAS B. NEEDLES,

Members of the Commission to the Five Civilized Tribes,

AND TO THE OFFICERS

in charge of the office established by the said Commission to the Five Civilized Tribes in the

town of *Vinita*, in the Cherokee Nation and the Indian Territory, for the purpose of allotting the land within the limits of the Cherokee Nation, in accordance with the act of Congress entitled "An Act to provide for the allotment of the lands of the Cherokee Nation, for the disposition of Townsites therein, and for other purposes," approved July first, nineteen hundred and two, and which was ratified and adopted by the said Cherokee Tribe or Nation of Indians, and under the regulations made in accordance with the said act:

You and each of you are hereby notified that the Missouri, Kansas and Texas Railway Company, a corporation incorporated and organized under and by virtue of the laws of the State of Kansas, claims every alternate section of land, or parts thereof, designated by odd numbers to the extent of ten sections per mile on each side of its line of railroad through the Cherokee Nation, within twenty miles from the line of said road, and in case that it shall appear that the United States had at the time when the line of said road was definitely located, sold any of said sections, or any part thereof, or that right of pre-emption or homestead settlement had attached to the same, or that the same had been reserved by the United States for any purpose whatever, then the said Missouri, Kansas and Texas Railway Company claims from the lands nearest to the sections above specified, so much land as shall be equal to the amount of such lands as the United States has sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or pre-emption had attached, and that said claim is based upon an Act of Congress entitled, "An Act granting Lands to the State of Kansas to aid in the construction of the Kansas and

Neosho Valley Railroad, and its Extension to Red River," approved July 25, 1866, and published in Volume fourteen of the United States Statutes at Large, pages two hundred and thirty-six to two hundred and thirty-nine, inclusive, and sections one, eight, nine and eleven of which said Act are as follows:

Be it Enacted by the Senate and House of Representatives of the United States of America in Congress Assembled:

"SECTION 1. That for the purpose of aiding the Kansas and Neosho Valley Railroad Company, the same being a corporation organized under the laws of the State of Kansas, to construct and operate a railroad from the eastern terminus of the Union Pacific Railroad, eastern division, at the line between Kansas and Missouri, at or near the mouth of the Kansas River, on the south side thereof, southwardly, through the eastern tier of counties in Kansas, with a view of its extension, so as to effect a junction at Red River with a railroad now being constructed from Galveston to Red River at or near Preston, in Texas, there is hereby granted to the State of Kansas, for the use and benefit of said railroad company, every alternate section of land, or parts thereof, designated by odd numbers, to the extent of ten sections per mile on each side of said road, to be selected within twenty miles from (of) the line of said road; but in case it shall appear that the United States have, when the line of said road is definitely located, sold any section, or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid, from the public lands of the United States

nearest to the sections above specified, so much land as shall be equal to the amount of such lands as the United States have sold, reserved or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached as aforesaid, which lands, thus indicated by the direction of the Secretary of the Interior, shall be reserved and held for the State of Kansas for the use of said company by the said Secretary for the purpose of construction and operation of said railroad, as provided by this Act: *Provided*, That any and all lands heretofore reserved to the United States by any Act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby reserved and excepted from the operation of this act, except so far as it may be found necessary to locate the route of said road through such reserved lands, in which case the right of way two hundred feet in width is hereby granted, subject to the approval of the President of the United States: *And provided further*, That none of the lands hereby granted shall be selected beyond twenty miles from the said road.

SEC. 8. And be it further enacted, That said Kansas and Neosho Valley Railroad Company, its successors and assigns, is hereby authorized and empowered to extend and construct its railroad from the southern boundary of Kansas south, through the Indian Territory, to Red River, at or near Preston, in the State of Texas, so as to connect with the railroad now being constructed from Galveston to a point at or near Preston, in said state; and the right of way through the Indian Territory, wherever such right is now reserved, or may hereafter be reserved to the United States by treaty with the Indian Tribes, is hereby granted to said

company, to the same extent as granted by the sixth section of this act through the public lands; and in all cases where the right of way, as aforesaid, through the Indian lands, shall not be reserved to the government, the said company shall, before constructing its road, procure the consent of the tribes interested, which consent, with all its terms and conditions, shall be previously approved and indorsed by the President and filed with the Secretary of the Interior.

SEC. 9. And be it further enacted, That the same grants of lands through said Indian Territory are hereby made as provided in the first section of this act, whenever the Indian title shall be extinguished by treaty or otherwise, not to exceed the ratio per mile granted in the first section of this act: *Provided*, That said lands become a part of the public lands of the United States.

SEC. 11. And be it further enacted, That any Railroad Company chartered under any law of the United States, or of the state of Kansas, which may have been heretofore or shall hereafter be recognized and subsidized by any act of the Congress of the United States, may connect, unite and consolidate with this railroad company after the same shall be located to the valley of the Neosho River, upon just, fair and equitable terms, to be agreed upon by the parties, and shall not be against the public interest or the interest of the United States; nor shall any road authorized to connect as aforesaid charge the road so connecting a greater tariff per mile for freight or passengers than is charged for the same per mile by its own road: *And provided further*, That should the Leavenworth, Lawrence and Fort Gibson Railroad Company, or the Union Pacific Railroad Company, southern branch, construct and complete its road to that point

on the southern boundary of the State of Kansas where the line of said Kansas and Neosho Valley Railroad shall cross the same before the said Kansas and Neosho Valley Railroad Company shall have constructed and completed its said road to said point, then and in that event the company so first reaching in completion the said point on the southern boundary of the State of Kansas, shall be authorized, upon obtaining the written approval of the President of the United States, to construct and operate its line of railroad from said point to a point at or near Preston, in the State of Texas, with grants of land according to the provisions of this act, but upon the further special condition, nevertheless, that said railroad company shall have commenced in good faith the construction thereof before the said Kansas and Neosho Valley Railroad Company shall have completed its said railroad to said point: *And provided further*, That said other railroad company so having commenced said work in good faith shall continue to prosecute the same with sufficient energy to insure the completion of the same within a reasonable time, subject to the approval of the President of the United States: *And provided further*, That the right of way through private property when not otherwise provided for in this act, or by the law of any State through which the road may pass, shall be obtained by said Kansas and Neosho Valley Railroad Company, or either of the other companies named in this act, in accordance with the provisions of section three of an act to amend an act entitled 'An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes,' approved July first, eighteen hundred and sixty-two."

Said Missouri, Kansas and Texas Railway Company further respectfully shows that it is the same corporation mentioned in section eleven of said act of Congress hereinabove quoted as "Union Pacific Railroad Company, southern branch," its corporate name having since been changed to "Missouri, Kansas and Texas Railway Company," and that it, in accordance with the provisions of said act of Congress, and said section eleven thereof, obtained the written approval of the President of the United States to construct and operate its line of railroad from the point on the southern boundary of the State of Kansas, indicated in said act, to the point at or near Preston, in the State of Texas, also indicated in said act, and has since the construction of its line of railroad between said points, in accordance with the said approval of the President of the United States, operated its said line of railroad between said points, in accordance with said approval of the President of the United States, and said act of Congress hereinabove referred to.

And said Missouri, Kansas and Texas Railway Company respectfully demands that the sections of land hereinbefore referred to as being claimed by the said Missouri, Kansas and Texas Railway Company in accordance with the provisions of said act of Congress approved July 25th, 1866, and hereinabove mentioned, be allotted to the Missouri, Kansas and Texas Railway Company, and that none of the said sections, or any parts thereof, be allotted to any other person whomsoever, and that you do not register any selection of any lands covered by any of the sections hereinabove shown to be claimed by said Missouri, Kansas and Texas Railway Company, made by any member of said Cherokee Tribe or Nation, for his allotment, and that you do not receive any application from any member of said

Tribe or Nation in which is described any land hereinabove shown to be claimed by said Missouri, Kansas and Texas Railway Company.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY,

JAMES HAGERMAN and
CLIFFORD L. JACKSON,
Its Attorneys.

Vinita, Indian Territory,

January 1, 1903.

UNITED STATES OF AMERICA,)
Indian Territory,) ss.
Northern Judicial District.)

I, William H. Darrough, United States Marshal for the Northern Judicial District of the Indian Territory, hereby certify that I served the above and foregoing notice by delivering a full, true and correct copy thereof to the Honorable in capacity as member of the Commission to the Five Civilized Tribes and also by delivering a full, true and correct copy thereof to Phil G. Reuter as the officer in charge of the land office established by the said Commission to the Five Civilized Tribes in the town of Vinita, in the Cherokee Nation and the Indian Territory, for the purpose of allotting the lands within the limits of the Cherokee Nation, in accordance with the Act of Congress entitled "An Act to provide for the allotment of the lands of the Cherokee Nation, for the disposition of town sites therein, and for other purposes," approved July first, nineteen hundred and two, and which was ratified and adopted by the said Cherokee Tribe or Nation of Indians, and under the Regulations made in accordance with said Act, said copies of said notice having been delivered to said Phil G. Reuter, clerk in charge at the land office in the town of Vinita, in the Cherokee Nation and the Indian Territory, at the hour of eleven o'clocok and minutes A. M. on the 2d day of January, A. D. 1903, after the aforesaid land office had been opened for public business and before any citizen of the Cherokee Tribe or Nation of Indians, or any Freedman of said Tribe or Nation, had presented or filed any papers in said office for the purpose of regis-

tering any selection of land or selecting any land for allotment; and I further certify that the said Henry L. Dawes and Tams Bixby, Clifton R. Breckenridge and Thos. B. Needles, members of said Commission to the Five Civilized Tribes, were not found in the said Northern Judicial District of the Indian Territory; all of which was done in the Northern Judicial District of the Indian Territory.

In Witness Whereof, I have hereunto set my hand as United States Marshal for the Northern Judicial District of the Indian Territory, this second day of January, A. D. 1903.

W. H. DARROUGH,
United States Marshal.

EXHIBIT 15

THE HONORABLE
THOMAS M. BUFFINGTON,
Principal Chief, Cherokee Nation.

You are hereby notified that the Missouri, Kansas and Texas Railway Company, a corporation, organized and existing under and by virtue of the laws of the State of Kansas, claims every alternate section of land, or parts thereof, designated by odd numbers to the extent of ten sections per mile on each side of its main line of railroad through the Cherokee Nation, within twenty miles from the line of said road, and that said claim is based upon an act of Congress entitled, "An Act granting Lands to the State of Kansas to aid in the Construction of the Kansas and Neosho Valley Railroad and its Extension to Red River," approved July 25, 1866, and published in Volume Fourteen of the United States Statutes at Large, pages two hundred and thirty-six to two hundred and thirty-nine, inclusive, and sections one, eight, nine and eleven of which said act are as follows:

"*Be it Enacted by the Senate and House of Representatives of the United States of America in Congress Assembled*:

"That for the purpose of aiding the Kansas and Neosho Valley Railroad Company, the same being a corporation organized under the laws of the State of Kansas, to construct and operate a railroad from the eastern terminus of the Union Pacific Railroad, eastern division, at the line between Kansas and Missouri, at or near the mouth of the Kansas River, on the south side thereof, southwardly, through the eastern tier of counties in Kansas, with a view of its extension, so as to effect a junction at Red River with a railroad now be-

ing constructed from Galveston to Red River at or near Preston, in Texas, there is hereby granted to the State of Kansas, for the use and benefit of said railroad company, every alternate section of land or parts thereof, designated by odd numbers, to the extent of ten sections per mile on each side of said road, to be selected within twenty miles *from* (of) the line of said road; but in case it shall appear that the United States have, when the line of said road is definitely located, sold any section, or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid, from the public lands of the United States nearest to the sections above specified, so much land as shall be equal to the amount of such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached as aforesaid, which lands, thus indicated by the direction of the Secretary of the Interior, shall be reserved and held for the State of Kansas for the use of said company by the said Secretary for the purpose of the construction and operation of said railroad, as provided by this act: *Provided*, That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby, reserved and excepted from the operation of this act, except so far as it may be found necessary to locate the route of said road through such reserved lands, in which case the right of way two hundred feet in width is hereby granted, subject to the approval of the President of the United States: *And pro-*

vided further, That none of the lands hereby granted shall be selected beyond twenty miles from the said road.

SEC. 8. And be it further enacted, That said Kansas and Neosho Valley Railroad Company, its successors and assigns, is hereby authorized and empowered to extend and construct its railroad from the southern boundary of Kansas south, through the Indian Territory, to Red River, at or near Preston, in the State of Texas, so as to connect with the railway now being constructed from Galveston to a point at or near Preston, in said State; and the right of way through the Indian Territory, wherever such right is now reserved or may hereafter be reserved to the United States by treaty with the Indian tribes, is hereby granted to said company, to the same extent as granted by the sixth section of this act through the public lands; and in all cases where the right of way, as aforesaid, through the Indian lands, shall not be reserved to the government, the said company shall, before constructing its road, procure the consent of the tribe or tribes interested, which consent, with all its terms and conditions, shall be previously approved and indorsed by the President and filed with the Secretary of the Interior.

SEC. 9. And be it further enacted, That the same grants of lands through said Indian Territory are herebe made as provided in the first section of this act, whenever the Indian title shall be extinguished by treaty or otherwise, not to exceed the ratio per mile granted in the first section of this act: *Prorided*, That said lands become a part of the public lands of the United States.

SEC. 11. And be it further enacted, That any railroad company chartered under any law of the United

States, or of the State of Kansas, which may have been heretofore or shall hereafter be recognized and subsidized by any act of the Congress of the United States, may connect, unite, and consolidate with this railroad company, after the same shall be located to the valley of the Neosho River, upon just, fair, and equitable terms, to be agreed upon between the parties, and shall not be against the public interest or the interest of the United States; nor shall any road authorized to connect as aforesaid charge the road so connecting a greater tariff per mile for freight or passengers than is charged for the same per mile by its own road: *And provided further*, That should the Leavenworth, Lawrence and Fort Gibson Railroad Company, or the Union Pacific Railroad Company, southern branch, construct and complete its road to that point on the southern boundary of the State of Kansas where the line of said Kansas and Neosho Valley Railroad shall cross the same, before the said Kansas and Neosho Valley Railroad Company shall have constructed and completed its said road to said point, then and in that event the company so first reaching in completion the said point on the southern boundary of the State of Kansas shall be authorized, upon obtaining the written approval of the President of the United States, to construct and operate its line of railroad from said point to a point at or near Preston, in the State of Texas, with grants of land according to the provisions of this act, but upon the further special condition, nevertheless, that said railroad company shall have commenced in good faith the construction thereof before the said Kansas and Neosho Valley Railroad Company shall have completed its said railroad to said point: *And provided further*, That said other railroad company, so having commenced said work in good faith, shall continue to prosecute the same with sufficient

energy to insure the completion of the same within a reasonable time, subject to the approval of the President of the United States: *And provided further*, That the right of way through private property when not otherwise provided for in this act, or by the law of any State through which the road may pass, shall be obtained by said Kansas and Neosho Valley Railroad Company, or either of the other companies named in this act, in accordance with the provisions of section three of an act to amend an act entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes," approved July first, eighteen hundred and sixty-two.

Approved, July 25, 1866.

Said Missouri, Kansas and Texas Railway Company further respectfully shows that it is the same corporation mentioned in said section eleven of said act of Congress hereinabove quoted as "Union Pacific Railroad Company, southern branch,' its corporate name having since been changed to "Missouri, Kansas and Texas Railway Company," and that it, in accordance with the provisions of said act of Congress, and said section eleven thereof, obtained the written approval of the President of the United States to construct and operate its line of railroad from the point on the southern boundary of the State of Kansas, indicated in said act, to the point at or near Preston, in the State of Texas, also indicated in said act, and has since the construction of its line of railroad between said points, in accordance with the said approval of the President of the United States, operated its said line of railroad between said points, in accordance with the approval of the

President of the United States and said act of Congress hereinabove referred to.

And the said Missouri, Kansas and Texas Railway Company respectfully demands that you do not execute or deliver to any person any deed to or conveyance of, either as an allotment or as a town lot, or on any other account or for any other purpose, any of the sections of land, or any part thereof, hereinabove referred to as being claimed by the said Missouri, Kansas and Texas Railway Company, in accordance with the provisions of said act of Congress approved July twenty-fifth, eighteen hundred and sixty-six, as hereinabove mentioned.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY.

By

JAMES HAGERMAN and
CLIFFORD L. JACKSON,
Its Attorneys.

Dated at Muskogee, Indian Territory,
November 14, 1902.

UNITED STATES OF AMERICA,)
Indian Territory,) ss.
Northern District.)

G. P. Fogle, of lawful age, upon his oath states that he served upon Thomas M. Buffington, Principal Chief Cherokee Nation, the within and foregoing notice by delivering a full, true and correct copy thereof to the said Thomas M. Buffington, on the 25th day of February, 1903, all of which was done in the town of Vinita, and said Northern Judicial District of the Indian Territory.

G. P. FOGLE.

Subscribed and sworn to before me, the undersigned, a Notary Public within and for the Northern Judicial District of the Indian Territory, this 25th day of February, 1903.

My commission expires on the 22d day of April, 1903.

[SEAL] GEO. E. MCCULLOCH,

Notary Public.

EXHIBIT 16

TO THE HONORABLES

EDWIN LONG,
DORWIN HIGLEY,
LUCIAN W. BUFFINGTON,

Members of the Townsite Commission for the Cherokee Nation, Indian Territory:

You, and each of you, are hereby notified that the Missouri, Kansas and Texas Railway Company, a corporation, incorporated and organized under and by virtue of the laws of the State of Kansas, claims every alternate section of land, or parts thereof, designated by odd numbers to the extent of ten sections per mile on each side of its line of railroad through the Cherokee Nation, within twenty miles from the line of said road, and that said claim is based upon an act of Congress entitled, "An act granting Lands to the State of Kansas to aid in the Construction of the Kansas and Neosho Valley Railroad, and its Extension to Red River," approved July 25, 1866, and published in Volume Fourteen of the United States Statutes at Large, pages two hundred and thirty-six to two hundred and thirty-nine, inclusive, and sections one, eight, nine and eleven of which said act are as follows:

"*Be it Enacted by the Senate and House of Representatives of the United States of America in Congress Assembled*:

"That for the purpose of aiding the Kansas and Neosho Valley Railroad Company, the same being a corporation organized under the laws of the State of Kansas, to construct and operate a railroad from the eastern terminus of the Union Pacific Railroad, eastern division, at the line between Kansas and Missouri, at or near the mouth of the Kansas River, on the south side

thereof, southwardly, through the eastern tier of counties in Kansas, with a view of its extension, so as to effect a junction at Red River with a railroad now being constructed from Galveston to Red River at or near Preston, in Texas, there is hereby granted to the State of Kansas, for the use and benefit of said railroad company, every alternate section of land or parts thereof, designated by odd numbers, to the extent of ten sections per mile on each side of said road, to be selected within twenty miles *from* (of) the line of said road; but in case it shall appear that the United States have, when the line of said road is definitely located, sold any section, or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purpose aforesaid, from the public lands of the United States nearest to the sections above specified, so much land as shall be equal to the amount of such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached as aforesaid, which lands, thus indicated by the direction of the Secretary of the Interior, shall be reserved and held for the State of Kansas for the use of said company by the said Secretary for the purpose of construction and operation of said railroad, as provided by this act: *Provided*, That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby, reserved and excepted from the operation of this act, except so far as it may be found necessary to locate the route of said road through such re-

served lands, in which case the right of way two hundred feet in width is hereby granted, subject to the approval of the President of the United States: *And provided further*, That none of the lands hereby granted shall be selected beyond twenty miles from said road.

SEC. 8. And be it further enacted, That said Kansas and Neosho Valley Railroad Company, its successors and assigns, is hereby authorized and empowered to extend and construct its railroad from the southern boundary of Kansas south, through the Indian Territory, to Red River, at or near Preston, in the State of Texas, so as to connect with the railway now being constructed from Galveston to a point at or near Preston, in said State; and the right of way through the Indian Territory, wherever such right is now reserved or may hereafter be reserved to the United States by treaty with the Indian tribes, is hereby granted to said company, to the same extent as granted by the sixth section of this act through the public lands; and in all cases where the right of way, as aforesaid, through the Indian lands, shall not be reserved to the government, the said company shall, before constructing its road, procure the consent of the tribe or tribes interested, which consent, with all its terms and conditions, shall be previously approved and indorsed by the President and filed with the Secretary of the Interior.

SEC. 9. And be it further enacted, That the same grants of land through said Indian Territory are hereby made as provided in the first section of this act, whenever the Indian title shall be extinguished by treaty or otherwise, not to exceed the ratio per mile granted in the first section of this act: *Provided*, That said lands become a part of the public lands of the United States.

SEC. 11. And be it further enacted, That any railroad company chartered under any law of the United States, or of the State of Kansas, which may have been

heretofore or shall hereafter be recognized and subsidized by any act of the Congress of the United States, may connect, unite, and consolidate with this railroad company, after the same shall be located to the valley of the Neosho River, upon just, fair, and equitable terms, to be agreed upon between the parties, and shall not be against the public interest or the interest of the United States; nor shall any road authorized to connect as aforesaid charge the road so connecting a greater tariff per mile for freight or passengers than is charged for the same per mile by its own road: *And provided further*, That should the Leavenworth, Lawrence, and Fort Gibson Railroad Company, or the Union Pacific Railroad Company, southern branch, construct and complete its road to that point on the southern boundary of the State of Kansas where the line of said Kansas and Neosho Valley Railroad shall cross the same, before the said Kansas and Neosho Valley Railroad Company shall have constructed and completed its said road to said point, then and in that event the company so first reaching in completion the said point on the southern boundary of the State of Kansas shall be authorized, upon obtaining the written approval of the President of the United States, to construct and operate its line of railroad from said point to a point at or near Preston, in the State of Texas, with grants of land according to the provisions of this act, but upon the further special condition, nevertheless, that said railroad company shall have commenced in good faith the construction thereof before the said Kansas and Neosho Valley Railroad Company shall have completed its said railroad to said point: *And provided further*, That said other railroad company, so having commenced said work in good faith, shall continue to prosecute the same with sufficient energy to insure the completion of the same within a reasonable time, subject to the approval of the President

of the United States: *And provided further*, That the right of way through private property when not otherwise provided for in this act, or by the law of any State through which the road may pass, shall be obtained by said Kansas and Neosho Valley Railroad Company, or either of the other companies named in this act, in accordance with the provisions of section three of an act to amend an act entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes," approved July first, eighteen hundred and sixty-two.

Approved, July 25, 1866.

Said Missouri, Kansas and Texas Railway Company further respectfully shows that it is the same corporation mentioned in section eleven of said act of Congress hereinabove quoted as "Union Pacific Railroad Company, southern branch,' its corporate name having since been changed to "Missouri, Kansas and Texas Railway Company," and that, in accordance with the provisions of said act of Congress, and said section eleven thereof, it obtained the written approval of the President of the United States to construct and operate its line of railroad from the point on the southern boundary of the State of Kansas, indicated in said act, to the point at or near Preston, in the State of Texas, also indicated in said act, and has since the construction of its line of railroad between said points, in accordance with the said approval of the President of the United States, operated its said line of railroad between said points, in accordance with said approval of the President of the United States and said act of Congress hereinabove referred to.

And the said Missouri, Kansas and Texas Railway Company respectfully demands that you do not cause to be surveyed, laid out or platted, or appraised, in any townsite in the Cherokee Nation, any town lots, blocks, streets, alleys, parks, or for any other purpose, any of the sections of land, or any part or parts thereof, hereinabove referred to as being claimed by the said Missouri, Kansas and Texas Railway Company in accordance with the provisions of said act of Congress approved July twenty-fifth, eighteen hundred and sixty-six, and hereinabove mentioned.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY,

By

JAMES HAGERMAN and
CLIFFORD L. JACKSON,
Its Attorneys.

Dated at Vinita, Indian Territory,
September 1st, 1902.

UNITED STATES OF AMERICA,)
Indian Territory,) ss.
Northern District.)

G. P. Fogle, of lawful age, upon his oath states that he served upon Edwin Long, Darwin Higley, Lucian W. Buffiington, Members of the Townsite Commission for the Cherokee Nation, the within and foregoing notice by delivering a full, true and correct copy thereof to Edwin Long, at 12:30 o'clock P. M., on the 3d day of December, 1902, and by delivering a full, true and correct copy thereof to Dorwin Higley, at 10 o'clock A. M., on the 1st day of December, 1902, and by delivering a full, true and correct copy thereof to Lucian W. Buffington at 10 o'clock A. M., on the 1st day of December, 1902, all of which was done in the town of Vinita, and in the said Northern District of the Indian Territory.

G. P. FOGLE.

Subscribed and sworn to before me, the undersigned, a Notary Public within and for the Northern District of the Indian Territory, on this 3d day of December, 1902.

My commission expires on the 22d day of April, 1903.

[SEAL] GEO. E. MCCULLOUGH,
Notary Public.

EXHIBIT 17

TO THE HONORABLES

HENRY L. DAWES, Chairman;
TAMS BIXBY, Acting Chairman;
ARCHIBALD S. McKENNON,
THOMAS B. NEEDLES,

Members of the Commission to the Five Civilized Tribes,

AND TO THE OFFICERS

in charge of the office established by the said Commission at the town of Muskogee, in the Creek Nation, and Indian Territory for the purpose of registering each and every selection of land made by any member of the said Creek Tribe or Nation for his allotment, in accordance with the rules and regulations governing the selection and renting of prospective allotments of lands in the Indian Territory, prescribed by the Secretary of the Interior under the provisions of the Act of Congress approved June 28th, 1898, which said rules and regulations are dated at Washington, D. C., October seventh, 1898, and at which citizens of the Creek Nation and Creek Freedmen may each select one hundred and sixty acres of land from the Creek domain as a preliminary allotment as provided in the notice of said Commissioners dated at Muskogee, Indian Territory, March sixth, 1899:

You and each of you are hereby notified that the Missouri, Kansas and Texas Railway Company, a corporation incorporated and organized under and by virtue of the laws of the State of Kansas, claims every alternate section of land, or parts thereof, designated

by odd numbers to the extent of ten sections per mile on each side of its line of railroad through the Creek Nation, within twenty miles from the line of said road, and in case it shall appear that the United States had at the time when the line of said road was definitely located, sold any of said sections, or any part thereof, or that the right of pre-emption or homestead settlement had attached to the same, or that the same had been reserved by the United States for any purpose whatever, then the said Missouri, Kansas and Texas Railway Company claims from the lands nearest to the sections above specified, so much land as shall be equal to the amount of such lands as the United States has sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or pre-emption had attached, and that said claim is based upon an Act of Congress entitled "An Act granting Lands to the State of Kansas to aid in the Construction of the Kansas and Neosho Valley Railroad, and its Extension to Red River," approved July 25th, 1866, and published in Volume fourteen of the United States Statutes at Large, pages two hundred and thirty-six to two hundred and thirty-nine, inclusive, and sections one, eight, nine and eleven of which said Act are as follows:

"*Be it Enacted by the Senate and House of Representatives of the United States of America in Congress Assembled*:

SECTION 1. That for the purpose of aiding the Kansas and Neosho Valley Railroad Company, the same being a corporation organized under the laws of the State of Kansas, to construct and operate a railroad from the eastern terminus of the Union Pacific Railroad, eastern division, at the line between Kansas and Missouri, at or near the mouth of the Kansas River, on the south side thereof, southwardly, through the eastern tier of

counties in Kansas, with a view of its extension, so as to effect a junction at Red River with a railroad now being constructed from Galveston to Red River at or near Preston, in Texas, there is hereby granted to the State of Kansas, for the use and benefit of said railroad company, every alternate section of land, or parts thereof, designated by odd numbers, to the extent of ten sections per mile on each side of said road, to be selected within twenty miles *from* (of) the line of said road; but in case it shall appear that the United States have, when the line of said road is definitely located, sold any section, or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid, from the public lands of the United States nearest to the sections above specified, so much land as shall be equal to the amount of such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached as aforesaid, which lands, thus indicated by the direction of the Secretary of the Interior, shall be reserved and held for the State of Kansas for the use of said company by the said Secretary for the purpose of the construction and operation of said railroad, as provided by this Act: Provided, That any and all lands heretofore reserved to the United States by any Act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby, reserved and excepted from the operation of this act, except so far as it may be found necessary to locate the route of said road through such reserved lands, in which case the right of way two

hundred feet in width is hereby granted, subject to the approval of the President of the United States: And provided further, That none of the lands hereby granted shall be selected beyond twenty miles from the said road.

SECTION 8. And be it further enacted, That said Kansas and Neosho Valley Railroad Company, its successors and assigns, is hereby authorized and empowered to extend and construct its railroad from the southern boundary of Kansas south, through the Indian Territory, to Red River, at or near Preston, in the State of Texas, so as to connect with the railway now being constructed from Galveston to a point at or near Preston, in said State; and the right of way through the Indian Territory, wherever such right is now reserved, or may hereafter be reserved to the United States by treaty with the Indian tribes, is hereby granted to said company, to the same extent as granted by the sixth section of this act through the public lands; and in all cases where the right of way, as aforesaid, through the Indian lands, shall not be reserved to the Government, the said company shall, before constructing its road, procure the consent of the tribe or tribes interested, which consent, with all its terms and conditions, shall be previously approved and indorsed by the President and filed with the Secretary of the Interior.

SECTION 9. And be it further enacted, That the same grants of lands through said Indian Territory are hereby made as provided in the first section of this act, whenever the Indian title shall be extinguished by treaty or otherwise; not to exceed the ratio per mile granted in the first section of this act: Provided, That said lands become a part of the public lands of the United States.

SECTION 11. And be it further enacted, That any railroad company chartered under any law of the United States, or of the State of Kansas, which may have been heretofore or shall hereafter be recognized and subsidized by any act of the Congress of the United States, may connect, unite, and consolidate with this railroad company, after the same shall be located to the valley of the Neosho River, upon just, fair, and equitable terms, to be agreed upon between the parties, and shall not be against the public interest or the interest of the United States; nor shall any road authorized to connect as aforesaid charge the road so connecting a greater tariff per mile for freight or passengers than is charged for the same per mile by its own road: And provided further, That should the Leavenworth, Lawrence and Fort Gibson Railroad Company, or the Union Pacific Railroad Company, southern branch, construct and complete its road to that point on the southern boundary of the State of Kansas where the line of said Kansas and Neosho Valley Railroad shall cross the same, before the said Kansas and Neosho Valley Railroad Company shall have constructed and completed its said road to said point, then and in that event the company so first reaching in completion the said point on the southern boundary of the State of Kansas, shall be authorized, upon obtaining the written approval of the President of the United States, to construct and operate its line of railroad from said point to a point at or near Preston, in the State of Texas, with grants of land according to the provisions of this act, but upon the further special condition, nevertheless, that said railroad company shall have commenced in good faith the construction thereof before the said Kansas and Neosho Valley Railroad Company shall have completed its said railroad to said point: And provided further, That said other railroad company so

having commenced said work in good faith, shall continue to prosecute the same with sufficient energy to insure the completion of the same within a reasonable time, subject to the approval of the President of the United States: And provided further, That the right of way through private property when not otherwise provided for in this act, or by the law of any State through which the road may pass, shall be obtained by said Kansas and Neosho Valley Railroad Company, or either of the other companies named in this act, in accordance with the provisions of section three of an act to amend an act entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes," approved July first, eighteen hundred and sixty-two.

Said Missouri, Kansas and Texas Railway Company further respectfully shows that it is the same corporation mentioned in section eleven of said Act of Congress hereinabove quoted as "Union Pacific Railroad Company, southern branch," its corporate name having since been changed to "Missouri, Kansas and Texas Railway Company," and that it, in accordance with the provisions of said Act of Congress, and said section eleven thereof, obtained the written approval of the President of the United States to construct and operate its line of railroad from the point on the southern boundary of the State of Kansas, indicated in said act, to the point at or near Preston, in the State of Texas, also indicated in said act, and has since the construction of its line of railroad between said points, in accordance with the said approval of the President of the United States, operated its said line of railroad between said points, in accordance with said approval of the President of the United States, and said Act of Congress hereinabove referred to.

And said Missouri, Kansas and Texas Railway Company respectfully demands that the sections of land hereinabove referred to as being claimed by the said Missouri, Kansas and Texas Railway Company in accordance with the provisions of said Act of Congress approved July 25th, 1866, and hereinabove mentioned, be allotted to the Missouri, Kansas and Texas Railway Company, and that neither any of said sections nor any parts thereof be allotted to any other person whomsoever and that you do not register any selection of any lands covered by any of the sections hereinabove shown to be claimed by said Missouri, Kansas and Texas Railway Company, made by any member of said Creek Nation or Tribe, for his allotment, and that you do not receive any application from any member of said Tribe or Nation in which is described any land hereinabove shown to be claimed by said Missouri, Kansas and Texas Railway Company.

THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY,
By
JAMES HAGERMAN
AND CLIFFORD L. JACKSON,
Its Attorneys.

Muskogee, Indian Territory, April the first, 1899, eight o'clock a. m.

Service by delivery of copy hereof to Tams Bixby, Archibald S. McKennon and Thomas B. Needles, at 9:06 a. m. this April 1st, 1899.

B. S. SMART, U. S. Marshal.

UNITED STATES OF AMERICA,)
INDIAN TERRITORY,) ss.
NORTHERN JUDICIAL DISTRICT.)

I, Leo E. Bennett, United States Marshal for the Northern Judicial District of the Indian Territory, do hereby certify that I served the above and foregoing notice by delivering a full, true and correct copy thereof to the Honorable Tams Bixby in his capacity as acting chairman of the Commission to the Five Civilized Tribes, and also in his capacity as the officer in charge of the office established by the said Commission to the Five Civilized Tribes, at the town of Muskogee, in the Creek Nation, and Indian Territory, for the purpose of registering each and every selection of land made by any member of the said Creek Tribe or Nation for his allotment in accordance with the rules and regulations governing the selection and renting of prospective allotments of lands in the Indian Territory, prescribed by the Secretary of the Interior under the provisions of the Act of Congress approved June 28th, 1898, which said rules and regulations are dated at Washington, D. C., October seventh, 1898, and at which citizens of the Creek Nation, and Creek Freedmen, may each select one hundred and sixty acres of land from the Creek Domain as a preliminary allotment as provided in the notice of said Commissioners dated at Muskogee, Indian Territory, March sixth, 1899, said copies of said notice having been delivered to said Bixby, at the land office in Muskogee, Indian Territory, at the hour of nine o'clock and six minutes a. m. on the first day of April, A. D. 1899, after the aforesaid land office had been opened for public business, and before any citizen of the Creek Tribe or Nation, or any Freedman of said Tribe or Nation, had presented or filed any papers in said office for

the purpose of registering any selection of land or selecting any land for allotment; and I further certify that I further served said notice by delivering a full, true and correct copy of the same to Honorable Archibald S. McKennon; and I further certify that I further served said notice by delivering a full, true and correct copy of the same to Honorable Thomas B. Needles, members of the said Commission to the Five Civilized Tribes, at the same time and place as said notices were served on said Bixby, and I further certify that said Henry L. Dawes, Chairman of said Commission, was not found within the said Northern Judicial District of the Indian Territory; all of which was done in the Northern Judicial District of the Indian Territory.

In Witness Whereof, I have hereunto set my hand as United States Marshal of the Northern Judicial District of the Indian Territory, this the first day of April, 1899.

LEO E. BENNETT,
United States Marshal for the Northern Judicial District of the Indian Territory.

EXHIBIT 18

To the Honorable Pleasant Porter, Principal Chief of the Creek Nation.

You are hereby notified that the Missouri, Kansas and Texas Railway Company, a corporation incorporated and organized under and by virtue of the laws of the State of Kansas, claims every alternate section of land, or parts thereof, designated by odd numbers to the extent of ten sections per mile on each side of its line of railroad through the Creek Nation, within twenty miles from the line of said road, and that said claim is based upon an Act of Congress entitled, "An Act granting Lands to the State of Kansas to aid in the Construction of the Kansas and Neosho Valley Railroad and its Extension to Red River," approved July 25, 1866, and published in Volume Fourteen of the United States Statutes at Large, pages two hundred and thirty-six to two hundred and thirty-nine, inclusive, and sections one, eight, nine and eleven of which said act are as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of aiding the Kansas and Neosho Valley Railroad Company, the same being a corporation organized under the laws of the State of Kansas, to construct and operate a railroad from the eastern terminus of the Union Pacific Railroad, eastern division, at the line between Kansas and Missouri, at or near the mouth of the Kansas River, on the south side thereof, southwardly, through the eastern tier of counties in Kansas, with a view of its extension, so as to effect a junction at Red River with a railroad now being constructed from Galveston to Red River at or near Preston, in Texas, there is hereby granted to the State of Kansas for the use and benefit of said railroad company, every alternate section of land or parts there-

of designated by odd numbers to the extent of ten sections per mile on each side of said road, to be selected within twenty miles *from* (of) the line of said road; but in case it shall appear that the United States have, when the line of said road is definitely located, sold any section, or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid, from the public lands of the United States nearest to the sections above specified, so much land as shall be equal to the amount of such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached as aforesaid, which lands, thus indicated by the direction of the Secretary of the Interior, shall be reserved and held for the State of Kansas for the use of said company by the said Secretary for the purpose of the construction and operation of said railroad, as provided by this act: Provided, That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby, reserved and excepted from the operation of this act, except so far as it may be found necessary to locate the route of said road through such reserved lands, in which case the right of way two hundred feet in width is hereby granted, subject to the approval of the President of the United States: And provided, further, That none of the lands hereby granted shall be selected beyond twenty miles from the said road.

SEC. 8. And be it further enacted, That said Kansas and Neosho Valley Railroad Company, its successors and assigns, is hereby authorized and empowered to extend and construct its railroad from the southern boundary of Kansas south, through the Indian Territory, to Red River, at or near Preston, in the State of Texas, so as to connect with the railway now being constructed from Galveston to a point at or near Preston, in said state; and the right of way through the Indian Territory, wherever such right is now reserved or may hereafter be reserved to the United States by treaty with the Indian tribes, is hereby granted to said company, to the same extent as granted by the sixth section of this act through the public lands; and in all cases where the right of way, as aforesaid, through the Indian lands, shall not be reserved to the government, the said company shall, before constructing its road, procure the consent of the tribe or tribes interested, which consent, with all its terms and conditions, shall be previously approved and indorsed by the President and filed with the Secretary of the Interior.

SEC. 9. And be it further enacted, That the same grants of lands through said Indian Territory are hereby made as provided in the first section of this act, whenever the Indian title shall be extinguished by treaty or otherwise, not to exceed the ratio per mile granted in the first section of this act: Provided, That said lands become a part of the public lands of the United States.

SEC. 11. And be it further enacted, That any railroad company chartered under any law of the United States, or of the State of Kansas, which may have heretofore or shall hereafter be recognized and subsidized by any act of the Congress of the United States, may connect, unite, and consolidate with this railroad com-

pany, after the same shall be located to the valley of the Neosho River, upon just, fair, and equitable terms, to be agreed upon between the parties, and shall not be against the public interest or the interest of the United States; nor shall any road authorized to connect as aforesaid charge the road so connecting a greater tariff per mile for freight or passengers than is charged for the same per mile by its own road: And provided further, That should the Leavenworth, Lawrence and Fort Gibson Railroad Company, or the Union Pacific Railroad Company, southern branch, construct and complete its road to that point on the southern boundary of the State of Kansas where the line of said Kansas and Neosho Valley Railroad shall cross the same, before the said Kansas and Neosho Valley Railroad Company shall have constructed and completed its said road to said point, then and in that event the company so first reaching in completion the said point on the southern boundary of the State of Kansas shall be authorized, upon obtaining the written approval of the President of the United States, to construct and operate its line of railroad from said point to a point at or near Preston, in the State of Texas, with grants of land according to the provisions of this act, but upon the further special condition, nevertheless, that said said railroad company shall have commenced in good faith the construction thereof before the said Kansas and Neosho Valley Railroad Company shall have completed its said railroad to said point: And provided further, That said other railroad company, so having commenced said work in good faith, shall continue to prosecute the same with sufficient energy to secure the completion of the same within a reasonable time, subject to the approval of the President of the United States: And provided further, That the right of way through private property when not other-

wise provided for in this act, or by the law of any state through which the road may pass, shall be obtained by said Kansas and Neosho Valley Railroad Company, or either of the other companies named in this act, in accordance with the provisions of section three of an act to amend an act entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes,' approved July first, eighteen hundred and sixty-two.

"Approved, July 25, 1866."

Said Missouri, Kansas and Texas Railway Company further respectfully shows that it is the same corporation mentioned in said section eleven of said act of Congress hereinabove quoted as "Union Pacific Railroad Company, southern branch," its corporate name having since been changed to "Missouri, Kansas and Texas Railway Company," and that it, in accordance with the provisions of said act of Congress, and said section eleven thereof, obtained the written approval of the President of the United States to construct and operate its line of railroad from the point on the southern boundary of the State of Kansas, indicated in said act, to the point at or near Preston, in the State of Texas, also indicated in said act, and has since the construction of its line of railroad between said points, in accordance with the said approval of the President of the United States, operated its said line of railroad between said points, in accordance with the approval of the President of the United States and said act of Congress hereinabove referred to.

And the said Missouri, Kansas and Texas Railway Company respectfully demands that you do not exe-

cute or deliver to any person any deed to or conveyance of, either as an allotment or as a town lot, or on any other account or for any other purpose, any of the sections of land, or any parts thereof, hereinabove referred to as being claimed by the said Missouri, Kansas and Texas Railway Company, in accordance with the provisions of said act of Congress approved July twenty-fifth, eighteen hundred and sixty-six, and hereinabove mentioned.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY,

By

JAMES HAGERMAN,

AND CLIFFORD L. JACKSON,

Its Attorneys.

Muskogee, Indian Territory, July 29, 1901.

UNITED STATES OF AMERICA,)
NORTHERN JUDICIAL DISTRICT.)
INDIAN TERRITORY,) ss.

I, Leo E. Bennett, United States Marshal for the Northern Judicial District of the Indian Territory, do hereby certify that I served the above and foregoing notice by delivering a true and correct copy thereof to Pleasant Porter, Principal Chief of the Creek Nation, all of which was done in the town of Muskogee, and said Northern Judicial District, of the Indian Territory, on this 29th day of July, 1901.

In Witness Whereof, I have hereunto set my hand as Marshal of said Northern Judicial District of the Indian Territory, on this the 29th day of July, 1901.

LEO E. BENNETT,
United States Marshal.
By....., Deputy.

EXHIBIT 19

To the Honorables Dwight W. Tuttle, Henry C. Linn, George A. Alexander, Members of the Townsite Commission for the Creek Nation, Indian Territory.

You and each of you are hereby notified that the Missouri, Kansas and Texas Railway Company, a corporation, incorporated and organized under and by virtue of the laws of the State of Kansas, claims every alternate section of land, or parts thereof, designated by odd numbers, to the extent of ten sections per mile on each side of its line of railroad through the Creek Nation, within twenty miles from the line of said road, and that said claim is based upon an act of Congress entitled, "An act granting Lands to the State of Kansas to aid in the Construction of the Kansas and Neosho Valley Railroad, and its Extension to Red River," approved July 25, 1866, and published in Volume Fourteen of the United States Statutes at Large, pages two hundred and thirty-six to two hundred and thirty-nine, inclusive, and sections one, eight, nine and eleven of which said act are as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of aiding the Kansas and Neosho Valley Railroad Company, the same being a corporation organized under the laws of the State of Kansas, to construct and operate a railroad from the eastern terminus of the Union Pacific Railroad, eastern division, at the line between Kansas and Missouri, at or near the mouth of the Kansas River, on the south side thereof, southwardly, through the eastern tier of counties in Kansas, with a view of its extension, so as to effect a junction at Red River with a railroad now

being constructed from Galveston to Red River at or near Preston, in Texas, there is hereby granted to the State of Kansas, for the use and benefit of said railroad company, every alternate section of land or parts thereof, designated by odd numbers, to the extent of ten sections per mile on each side of said road, to be selected within twenty miles *from* (of) the line of said road; but in case it shall appear that the United States have, when the line of said road is definitely located, sold any section, or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid from the public lands of the United States nearest to the sections above specified, so much land as shall be equal to the amount of such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached as aforesaid, which lands, thus indicated by the direction of the Secretary of the Interior, shall be reserved and held for the State of Kansas for the use of said company by the said Secretary for the purpose of construction and operation of said railroad, as provided by this act: Provided, That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby, reserved and excepted from the operation of this act, except so far as it may be found necessary to locate the route of said road through such reserved lands, in which case the right of way two hundred feet in width is hereby granted, subject to the approval of the President of the United States: And

provided further, That none of the lands hereby granted shall be selected beyond twenty miles from said road.

"SEC. 8. And be it further enacted, That said Kansas and Neosho Valley Railroad Company, its successors and assigns, is hereby authorized and empowered to extend and construct its railroad from the southern boundary of Kansas south, through the Indian Territory, to Red River, at or near Preston, in the State of Texas, so as to connect with the railway now being constructed from Galveston to a point at or near Preston, in said State; and the right of way through the Indian Territory, wherever such right is now reserved or may hereafter be reserved to the United States by treaty with the Indian tribes, is hereby granted to said company, to the same extent as granted by the sixth section of this act through the public lands; and in all cases where the right of way, as aforesaid, through the Indian lands, shall not be reserved to the government, the said company shall, before constructing its road, procure the consent of the tribe or tribes interested, which consent, with all its terms and conditions, shall be previously approved and indorsed by the President and filed with the Secretary of the Interior.

"SEC. 9. And be it further enacted, That the same grants of land through said Indian Territory are hereby made as provided in the first section of this act, whenever the Indian title shall be extinguished by treaty or otherwise, not to exceed the ratio per mile granted in the first section of this act: Provided, That said lands become a part of the public lands of the United States.

"SEC. 11. And be it further enacted, That any railroad company chartered under any law of the United States, or of the State of Kansas, which may have been

heretofore or shall hereafter be recognized and subsidized by any act of the Congress of the United States, may connect, unite, and consolidate with this railroad company, after the same shall be located to the valley of the Neosho River, upon just, fair, and equitable terms, to be agreed upon between the parties, and shall not be against the public interest or the interest of the United States; nor shall any road authorized to connect as aforesaid charge the road so connecting a greater tariff per mile for freight or passengers than is charged for the same per mile by its own road: And provided further, That should the Leavenworth, Lawrence and Fort Gibson Railroad Company, or the Union Pacific Railroad Company, southern branch, construct and complete its road to that point on the southern boundary of the State of Kansas where the line of said Kansas and Neosho Valley Railroad shall cross the same, before the said Kansas and Neosho Valley Railroad Company shall have constructed and completed its said road to said point, then and in that event the company so first reaching in completion the said point on the southern boundary of the State of Kansas shall be authorized, upon obtaining the written approval of the President of the United States, to construct and operate its line of railroad from said point to a point at or near Preston, in the State of Texas, with grants of land according to the provisions of this act, but upon the further special condition, nevertheless, that said railroad company shall have commenced in good faith the construction thereof before the said Kansas and Neosho Valley Railroad Company shall have completed its said railroad to said point: And provided further, That said other railroad company, so having commenced said work in good faith, shall continue to prosecute the same with sufficient energy to insure the completion of the same within a reasonable time, subject to the

approval of the President of the United States: And provided further, That the right of way through private property when not otherwise provided for in this act, or by the law of any State through which the road may pass, shall be obtained by said Kansas and Neosho Valley Railroad Company, or either of the other companies named in this act, in accordance with the provisions of section three of an act to amend an act entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes,' approved July first, eighteen hundred and sixty-two.

"Approved, July 25, 1866."

Said Missouri, Kansas and Texas Railway Company further respectfully shows that it is the same corporation mentioned in section eleven of said act of Congress hereinabove quoted as "Union Pacific Railroad Company, southern branch," its corporate name having since been changed to "Missouri, Kansas and Texas Railway Company," and that, in accordance with the provisions of said act of Congress, and said section eleven thereof, it obtained the written approval of the President of the United States to construct and operate its line of railroad from the point on the southern boundary of the State of Kansas, indicated in said act, to the point at or near Preston, in the State of Texas, also indicated in said act, and has since the construction of its line of railroad between said points, in accordance with the said approval of the President of the United States, operated its said line of railroad between said points, in accordance with said approval of the President of the United States and said act of Congress hereinabove referred to.

And the said Missouri, Kansas and Texas Railway Company respectfully demands that you do not cause to be surveyed, laid out or platted, or appraised, in any townsites in the Creek Nation, any town lots, blocks, streets, alleys, parks, or for any other purpose, any of the sections of land, or any part or parts thereof, hereinabove referred to as being claimed by the said Missouri, Kansas and Texas Railway Company in accordance with the provisions of said act of Congress approved July twenty-fifth, eighteen hundred and sixty-six, and hereinabove mentioned.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY,

By

JAMES HAGERMAN,
AND CLIFFORD L. JACKSON,
Its Attorneys.

Dated at Muskogee, Indian Territory, May 25, 1902.

UNITED STATES OF AMERICA,)
INDIAN TERRITORY,) ss.
WESTERN DISTRICT,)

Fred Rains, of lawful age, upon his oath states that he served upon Dwight W. Tuttle, Henry C. Linn, George A. Alexander, members of the Tow site Commission for the Creek Nation, the within and foregoing notice by delivering a full, true and correct copy thereof to Dwight W. Tuttle, at four o'clock p. m., on the 3d day of January, 1903, and by delivering a full, true and correct copy thereof to Henry C. Linn, at 3:30 o'clock p. m., on the 8th day of Jaanuary, 1903, and by delivering a full, true and correct copy thereof to George A. Alexander, at four o'clock p. m. on the 3d day of January, 1903, all of which was done in the town of Muskogee, and in the said Western District of the Indian Territory. FRED RAINS.

Subscribed and sworn to before me, the undersigned, a Notary Public within and for the Western District of the Indian Territory, on this 9th day of January, 1903.

My commission expires on the 2d day of July, 1906.
ERNEST BROWN, Notary Public.

EXHIBIT 20

To the Honorables H. C. Linn, James Roark, Toney Proctor, Members of the Townsite Commission for the Town of Wagoner, Creek Nation, Indian Territory:

You and each of you are hereby notified that the Missouri, Kansas and Texas Railway Company, a corporation incorporated and organized under and by virtue of the laws of the State of Kansas, claims every alternate section of land, or parts thereof, designated by odd numbers to the extent of ten sections per mile on each side of its line of railroad through the Creek Nation, within twenty miles from the line of said road, and that said claim is based upon an act of Congress entitled, "An Act granting Lands to the State of Kansas to aid in the Construction of the Kansas and Neosho Valley Railroad, and its Extension to Red River," approved July 25th, 1866, and published in Volume 14 of the United States Statutes at Large, pages two hundred and thirty-six to two hundred and thirty-nine, inclusive, and sections one, eight, nine and eleven of which said act are as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of aiding the Kansas and Neosho Valley Railroad Company, the same being a corporation organized under the laws of the State of Kansas, to construct and operate a railroad from the eastern terminus of the Union Pacific Railroad, eastern division, at the line between Kansas and Missouri, at or near the mouth of the Kansas River, on the south side thereof, southwardly, through the eastern tier of counties in Kansas, with a view of its extension, so as

to effect a junction at Red River with a railroad now being constructed from Galveston to Red River at or near Preston, in Texas, there is hereby granted to the State of Kansas for the use and benefit of said railroad company, every alternate section of land or parts thereof designated by odd numbers to the extent of ten sections per mile on each side of said road, to be selected within twenty miles *from* (of) the line of said road; but in case it shall appear that the United States have, when the line of said road is definitely located, sold any section, or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid, from the public lands of the United States nearest to the sections above specified, so much land as shall be equal to the amount of such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached as aforesaid, which lands, thus indicated by the direction of the Secretary of the Interior, shall be reserved and held for the State of Kansas for the use of said company by the said Secretary for the purpose of the construction and operation of said railroad, as provided by this act: Provided, That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby, reserved and excepted from the operation of this act, except so far as it may be found necessary to locate the route of said road through such reserved lands, in which case the right of way two hundred feet in width is hereby grant-

ed, subject to the approval of the President of the United States: And provided further, That none of the lands hereby granted shall be selected beyond twenty miles from the said road.

"SEC. 8. And be it further enacted, That said Kansas and Neosho Valley Railroad Company, its successors and assigns, is hereby authorized and empowered to extend and construct its railroad from the southern boundary of Kansas south, through the Indian Territory, to Red River, at or near Preston, in the State of Texas, so as to connect with the railway now being constructed from Galveston to a point at or near Preston, in said state; and the right of way through the Indian Territory, wherever such right is now reserved or may hereafter be reserved to the United States by treaty with the Indian tribes, is hereby granted to said company, to the same extent as granted by the sixth section of this act through the public lands; and in all cases where the right of way, as aforesaid, through the Indian lands, shall not be reserved to the government, the said company shall, before constructing its road, procure the consent of the tribe or tribes interested, which consent, with all its terms and conditions, shall be previously approved and indorsed by the President and filed with the Secretary of the Interior.

"SEC. 9. And be it further enacted, That the same grants of lands through said Indian Territory are hereby made as provided in the first section of this act, whenever the Indian title shall be extinguished by treaty or otherwise, not to exceed the ratio per mile granted in the first section of this act: Provided, That said lands become a part of the public lands of the United States.

"SEC. 11. And be it further enacted, That any railroad company chartered under any law of the United States, or of the State of Kansas, which may have been heretofore or shall hereafter be recognized and subsidized by any act of the Congress of the United States, may connect, unite, and consolidate with this railroad company, after the same shall be located to the valley of the Neosho River, upon just, fair, and equitable terms, to be agreed upon between the parties, and shall not be against the public interest or the interest of the United States; nor shall any road authorized to connect as aforesaid charge the road so connecting a greater tariff per mile for freight or passengers than is charged for the same per mile by its own road: And provided further, That should the Leavenworth, Lawrence and Fort Gibson Railroad Company, or the Union Pacific Railroad Company, southern branch, construct and complete its road to that point on the southern boundary of the state of Kansas where the line of said Kansas and Neosho Valley Railroad shall cross the same, before the said Kansas and Neosho Valley Railroad Company shall have constructed and completed its said road to said point, then and in that event the company so first reaching in completion the said point on the southern boundary of the State of Kansas shall be authorized, upon obtaining the written approval of the President of the United States, to construct and operate its line of railroad from said point to a point at or near Preston, in the State of Texas, with grants of land according to the provisions of this act, but upon the further special condition, nevertheless, that said railroad company shall have commenced in good faith the construction thereof before the said Kansas and Neosho Valley Railroad Company shall have completed its said railroad to said point: And provided further, That said other railroad company, so

having commenced said work in good faith, shall continue to prosecute the same with sufficient energy to insure the completion of the same within a reasonable time, subject to the approval of the President of the United States: And provided further, That the right of way through private property when not otherwise provided for in this act, or by the law of any state through which the road may pass, shall be obtained by said Kansas and Neosho Valley Railroad Company, or either of the other companies named in this act, in accordance with the provisions of section three of an act to amend an act entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes,' approved July first, eighteen hundred and sixty-two.

"Approved, July 25, 1866."

Said Missouri, Kansas and Texas Railway Company further respectfully shows that it is the same corporation mentioned in section eleven of said act of Congress hereinabove quoted as "Union Pacific Railroad Company, southern branch," its corporate name having since been changed to "Missouri, Kansas and Texas Railway Company," and that it, in accordance with the provisions of said act of Congress, and said section eleven thereof, obtained the written approval of the President of the United States to construct and operate its line of railroad from the point on the southern boundary of the State of Kansas, indicated in said act, to the point at or near Preston, in the State of Texas, also indicated in said act, and has since the construction of its line of railroad between said points, in accordance with the said approval of the President of the United States, operated its said line of railroad between

said points, in accordance with said approval of the President of the United States and said act of Congress hereinabove referred to.

And the said Missouri, Kansas and Texas Railway Company respectfully demands that you do not cause to be surveyed, laid out or platted in any townsites in the Creek Nation any town lots, streets, alleys, parks, or for any other purpose, any of the sections of land, or any part or parts thereof, hereinabove referred to as being claimed by the said Missouri, Kansas and Texas Railway Company in accordance with the provisions of said act of Congress approved July twenty-fifth, eighteen hundred and sixty-six, and hereinabove mentioned.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY,

By

JAMES HAGERMAN,
CLIFFORD L. JACKSON,
Its Attorneys.

EXHIBIT 21

Wagoner, Indian Territory, July 12th, 1901.

To the Honorables Dwight W. Tuttle, John Adams, Benjamin Marshall, Members of the Townsite Commission for the Town of Muskogee:

You and each of you are hereby notified that the Missouri, Kansas and Texas Railway Company, a corporation incorporated and organized under and by virtue of the laws of the State of Kansas, claims every alternate section of land, or parts thereof, designated by odd numbers to the extent of ten sections per mile on each side of its line of railroad through the Creek Nation, within twenty miles from the line of said road, and that said claim is based upon an Act of Congress entitled "An Act granting Lands to the State of Kansas to aid in the Construction of the Kansas and Neosho Valley Railroad, and its Extension to Red River," approved July 25, 1866, and published in Volume fourteen of the United States Statutes at Large, pages two hundred and thirty-six to two hundred and thirty-nine, inclusive, and sections one, eight, nine and eleven of which said Act are as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of aiding the Kansas and Neosho Valley Railroad Company, the same being a corporation organized under the laws of the State of Kansas, to construct and operate a railroad from the eastern terminus of the Union Pacific Railroad, eastern division, at the line between Kansas and Missouri, at or near the mouth of the Kansas River, on the south side thereof, southwardly, through the eastern tier of

counties in Kansas, with a view of its extension, so as to effect a junction at Red River with a railroad now being constructed from Galveston to Red River at or near Preston, in Texas, there is hereby granted to the State of Kansas, for the use and benefit of said railroad company, every alternate section of land or parts thereof, designated by odd numbers, to the extent of ten sections per mile on each side of said road, to be selected within twenty miles *from* (of) the line of said road; but in case it shall appear that the United States have, when the line of said road is definitely located, sold any section, or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid, from the public lands of the United States nearest to the sections above specified, so much land as shall be equal to the amount of such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached as aforesaid, which lands, thus indicated by the direction of the Secretary of the Interior, shall be reserved and held for the State of Kansas for the use of said company by the said Secretary for the purpose of the construction and operation of said railroad, as provided by this act: Provided, That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby, reserved and excepted from the operation of this act, except so far as it may be found necessary to locate the route of said road through such reserved lands, in which case

the right of way two hundred feet in width is hereby granted, subject to the approval of the President of the United States: And provided further, That none of the land hereby granted shall be selected beyond twenty miles from the said road.

"SEC. 8. And be it further enacted, That said Kansas and Neosho Valley Railroad Company, its successors and assigns, is hereby authorized and empowered to extend and construct its railroad from the southern boundary of Kansas south, through the Indian Territory, to Red River, at or near Preston, in the State of Texas, so as to connect with the railway now being constructed from Galveston to a point at or near Preston, in said State; and the right of way through the Indian Territory, wherever such right is now reserved or may hereafter be reserved to the United States by treaty with the Indian tribes, is hereby granted to said company, to the same extent as granted by the sixth section of this act through the public lands; and in all cases where the right of way, as aforesaid, through the Indian lands, shall not be reserved to the Government, the said company shall, before constructing its road, procure the consent of the tribe or tribes interested, which consent, with all its terms and conditions, shall be previously approved and indorsed by the President and filed with the Secretary of the Interior.

"SEC. 9. And be it further enacted, That the same grants of land through said Indian Territory are hereby made as provided in the first section of this act, whenever the Indian title shall be extinguished or otherwise, not to exceed the ratio per mile granted in the first section of this act: Provided, That said lands become a part of the public lands of the United States.

"SEC. 11. And be it further enacted, That any railroad company chartered under any law of the United

States, or of the State of Kansas, which may have been heretofore or shall hereafter be recognized and subsidized by any act of the Congress of the United States, may connect, unite, and consolidate with this railroad company, after the same shall be located to the valley of the Neosho River, upon just, fair and equitable terms, to be agreed upon between the parties, and shall not be against the public interest, or the interest of the United States; nor shall any road authorized to connect as aforesaid charge the road so connecting a greater tariff per mile for freight or passengers than is charged for the same per mile by its own road: And provided further, That should the Leavenworth, Lawrence and Fort Gibson Railroad Company, or the Union Pacific Railroad Company, southern branch, construct and complete its road to that point on the southern boundary of the State of Kansas where the line of said Kansas and Neosho Valley Railroad shall cross the same before the said Kansas and Neosho Valley Railroad Company shall have constructed and completed its said road to said point, then and in that event the company so first reaching in completion the said point on the southern boundary of the State of Kansas shall be authorized, upon obtaining the written approval of the President of the United States, to construct and operate its line of railroad from said point to a point at or near Preston, in the State of Texas, with grants of land according to the provisions of this act, but upon the further special condition, nevertheless, that said railroad company shall have commenced in good faith the construction thereof before the said Kansas and Neosho Valley Railroad Companay shall have completed its said railroad to said point: And provided further, That said other railroad company, so having commenced said work in good faith, shall continue to prosecute the same with sufficient energy to insure the completion of the same

within a reasonable time, subject to the approval of the President of the United States: And provided further, That the right of way through private property when not otherwise provided for in this act, or by the law of any State through which the road may pass, shall be obtained by said Kansas and Neosho Valley Railroad Company, or either of the other companies named in this act, in accordance with the provisions of section three of an act to amend an act entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes,' approved July first, eighteen hundred and sixty-two."

Said Missouri, Kansas and Texas Railway Company further respectfully shows that it is the same corporation mentioned in section eleven of said act of Congress hereinabove quoted as "Union Pacific Railroad Company, southern branch," its corporate name having since been changed to "Missouri, Kansas and Texas Railway Company," and that it, in accordance with the provisions of said act of Congress, and said section eleven thereof, obtained the written approval of the President of the United States to construct and operate its line of railroad from the point on the southern boundary of the State of Kansas, indicated in said act, to the point at or near Preston, in the State of Texas, also indicated in said act, and has since the construction of its line of railroad between said points, in accordance with the said approval of the President of the United States, operated its said line of railroad between said points, in accordance with said approval of the President of the United States and said act of Congress hereinabove referred to.

And the said Missouri, Kansas and Texas Railway

Company respectfully demands that you do not cause to be surveyed, laid out or platted in the Townsite of Muskogee any town lots, streets, alleys, parks, nor for any other purpose, any of the sections of land, or any part thereof, *any such section or sections of land* hereinabove referred to as being claimed by the said Missouri, Kansas and Texas Railway Company in accordance with the provisions of said act of Congress approved July twenty-fifth, eighteen hundred and sixty-six and hereinabove mentioned.

MISSSOURI, KANSAS AND TEXAS RAILWAY COMPANY,

By

JAMES HAGERMAN,
CLIFFORD L. JACKSON,
Its Attorneys.

Muskogee, Indian Territory, July 11th, 1901.

UNITED STATES OF AMERICA,)
INDIAN TERRITORY,) ss.
NORTHERN JUDICIAL DISTRICT,)

I, Leo E. Bennett, United States Marshal for the Northern Judicial District of the Indian Territory, do hereby certify that I served the above and foregoing notice by delivering a true, full and correct copy thereof to Dwight W. Tuttle, John Adams and Benjamin Marshall, each of whom were so served with such notice in the town of Muskogee, and said Northern Judicial District, of the Indian Territory, on this 12th day of July, 1901.

In Witness Whereof, I have hereunto set my hand as Marshal of said Northern Judicial District of the Indian Territory on this the 12th day of July, 1901.

LEO E. BENNETT,
United States Marshal.

EXHIBIT 22

To the Honorables Tams Bixby, Acting Chairman; Clifton R. Breckenridge, Thomas B. Needles, William E. Stanley, Members of the Commission to the Five Civilized Tribes,

And to the Officers in charge of the office established by the said Commission at Atoka, in the Choctaw Nation, Indian Territory, for the purpose of allotting the lands in the Choctaw and Chickasaw Nations, in accordance with an Act of Congress, entitled "An Act for the protection of the people of the Indian Territory, and for other purposes," approved June twenty-eighth, eighteen hundred and ninety-eight, which was ratified and adopted at an election of the Choctaw and Chickasaw Tribes or Nations of Indians, and in accordance with an Act of Congress entitled "An Act to ratify and confirm an agreement with the Choctaw and Chickasaw Tribes of Indians, and for other purposes," approved July first, nineteen hundred and two, which was also ratified and adopted by the said Choctaw and Chickasaw Tribes or Nations of Indians, and under the regulations made in accordance with both of said acts:

You, and each of you, are hereby notified that the Missouri, Kansas and Texas Railway Company, a corporation incorporated and organized under and by virtue of the laws of the State of Kansas, claims every alternate section of land or parts thereof, designated by odd numbers, to the extent of ten sections per mile on each side of its line of railroad through the Choctaw and Chickasaw Nations, within twenty miles of the line of said road; and in case it shall appear that the United

States had, when the line of said road was definitely located, sold any of said sections, or any part thereof, or that the right of pre-emption or homestead settlement had attached to the same, or that the same had been reserved by the United States for any purpose whatever, then the said Missouri, Kansas and Texas Railway Company claims from the lands nearest to the sections above specified so much land as shall be equal to the amount of such lands as the United States has sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or pre-emption had attached, and that said claim is based upon an Act of Congress entitled "An Act granting Lands to the State of Kansas to aid in the Construction of the Kansas and Neosho Valley Railroad, and its Extension to Red River," approved July 25, 1866, and published in Volume fourteen of the United States Statutes at Large, pages two hundred and thirty-six to two hundred and thirty-nine, inclusive, and sections one, eight, nine, and eleven of which said Act are as follows:

"SEC. 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of aiding the Kansas and Neosho Valley Railroad Company, the same being a corporation organized under the laws of the State of Kansas, to construct and operate a railroad from the eastern terminus of the Union Pacific Railroad, eastern division, at the line between Kansas and Missouri, at or near the mouth of the Kansas River, on the south side thereof, southwardly, through the eastern tier of counties in Kansas, with a view of its extension, so as to effect a junction at Red River with a railroad now being constructed from Galveston to Red River at or near Preston, in Texas, there is hereby granted to the State of Kansas, for the use and benefit

of said railroad company, every alternate section of land or parts thereof, designated by odd numbers, to the extent of ten sections per mile on each side of said road, to be selected within twenty miles *from* (of) the line of said road; but in case it shall appear that the United States have, when the line of said road is definitely located, sold any section, or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purpose aforesaid, from the public lands of the United States nearest to the sections above specified, so much land as shall be equal to the amount of such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached as aforesaid, which lands, thus indicated by the direction of the Secretary of the Interior, shall be reserved and held for the State of Kansas for the use of said company by the said Secretary for the purpose of the construction and operation of said railway, as provided by this act: Provided, That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby, reserved and excepted from the operation of this act, except so far as it may be found necessary to locate the route of said road through such reserved lands, in which case the right of way two hundred feet in width is hereby granted, subject to the approval of the President of the United States: And provided further, That none of the lands hereby granted shall be selected beyond twenty miles from the said road.

"SEC. 8. And be it further enacted, That said Kansas and Neosho Valley Railroad Company, its successors and assigns, is hereby authorized and empowered to extend and construct its railroad from the southern boundary of Kansas south, through the Indian Territory, to Red River, at or near Preston, in the State of Texas, so as to connect with the railway now being constructed from Galveston to a point at or near Preston, in said state; and the right of way through the Indian Territory, wherever such right is now reserved or may hereafter be reserved to the United States by treaty with the Indian Tribes, is hereby granted to said Company, to the same extent as granted by the sixth section of this act through the public lands; and in all cases where the right of way as aforesaid, through the Indian lands, shall not be reserved to the government, the said company shall, before constructiing its road, procure the consent of the tribe or tribes interested, which consent, with all its terms and conditions, shall be previously approved and indorsed by the President and filed with the Secretary of the Interior.

"SEC. 9. And be it further enacted, That the same grants of lands through said Indian Territory are hereby made as provided in the first section of this act, whenever the Indian title shall be extinguished by treaty or otherwise, not to exceed the ratio per mile granted in the first section of this act: Provided, That said lands become a part of the public lands of the United States.

"SEC. 11. And be it further enacted, That any railroad company chartered under any law of the United States, or of the State of Kansas, which may have been heretofore or shall hereafter be recognized and subsidized by any act of the Congress of the United States, may connect, unite, and consolidate with this railroad

company, after the same shall be located to the valley of the Neosho River, upon just, fair, and equitable terms, to be agreed upon between the parties, and shall not be against the public interest or the interest of the United States; nor shall any road authorized to connect as aforesaid charge the road so connecting a greater tariff per mile for freight or passengers than is charged for the same per mile by its own road: And provided further, That should the Leavenworth, Lawrence and Fort Gibson Railroad Company, or the Union Pacific Railroad Company, southern branch, construct and complete its road to that point on the southern boundary of the State of Kansas where the line of said Kansas and Neosho Valley Railroad shall cross the same, before the said Kansas and Neosho Valley Railroad Company shall have constructed and completed its said road to said point, then and in that event the company so first reaching in completion the said point on the southern boundary of the State of Kansas shall be authorized, upon obtaining the written approval of the President of the United States, to construct and operate its line of railroad from said point to a point at or near Preston, in the State of Texas, with grants of land according to the provisions of this act, but upon the further special condition, nevertheless, that said railroad company shall have commenced in good faith the construction thereof before the said Kansas and Neosho Valley Railroad Company shall have completed its said railroad to said point: And provided further, That said other railroad company, so having commenced said work in good faith, shall continue to prosecute the same with sufficient energy to insure the completion of the same within a reasonable time, subject to the approval of the President of the United States: And provided further, That the right of way through private

property when not otherwise provided for in this act, or by the law of any State through which the road may pass, shall be obtained by said Kansas and Neosho Valley Railroad Company, or either of the other companies named in this act, in accordance with the provision of section three of an act to amend an act entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes,' approved July first, eighteen hundred and sixty-two."

Said Missouri, Kansas and Texas Railway Company further respectfully shows that it is the same corporation mentioned in section eleven of said act of Congress hereinabove quoted as "Union Pacific Railroad Company, southern branch," its corporate name having since been changed to "Missouri, Kansas and Texas Railway Company," and that it, in accordance with the provisions of said act of Congress, and said section eleven thereof, obtained the written approval of the President of the United States to construct and operate its line of railroad from the point on the southern boundary of the State of Kansas, indicated in said Act, to the point at or near Preston, in the State of Texas, also indicated in said act, and has, since the construction of its line of railroad between said points, in accordance with the said approval of the President of the United States, operated its said line of railroad between said points, in accordance with said approval of the President of the United States, and said Act of Congress hereinabove referred to.

And said Missouri, Kansas and Texas Railway company respectfully demands that the sections of land hereinabove referred to as claimed by the said Missouri, Kansas and Texas Railway Company, in accordance

with the provisions of said Act of Congress approved July 25, 1866, and hereinabove mentioned, be allotted to the Missouri, Kansas and Texas Railway Company, and that none of said sections, or any parts thereof, be allotted to any person whomsoever, and that you do not register any selection of any lands covered by any of the sections hereinabove shown to be claimed by said Missouri, Kansas and Texas Railway Company, made by any member of said Choctaw or Chickasaw Tribes or Nations, or any Choctaw or Chickasaw Freedmen, for his allotment, and that you do not receive any application from any member of said Tribes or Nations, or any Choctaw or Chickasaw Freedman, in which is described any land hereinabove shown to be claimed by said Missouri, Kansas and Texas Railway Company.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY,

By

JAMES HAGERMAN,
AND CLIFFORD L. JACKSON,
Its Attorneys.

Dated at Atoka, Indian Territory, April 15, 1903.

UNITED STATES OF AMERICA,)
..... DISTRICT,) ss.
INDIAN TERRITORY.)

I, the undersigned, B. F. Hackett, United States Marshal within and for the Central District of the Indian Territory, hereby certify that I served the within and foregoing notice by delivering a full, true and correct copy of the same to Tams Bixby, at 8:40 o'clock a. m., as Chairman, and ————, at —— o'clock — m., and ————, at —— o'clock — m., and ————, at —— o'clock — m., as members of the Commission to the Five Civilized Tribes, and H. G. Angell, at 8:40 o'clock a. m., and W. O. Beall, at 8:40 o'clock a. m., as officers in charge of the Land Office established by the Commission to the Five Civilized Tribes at Atoka, in the Choctaw Nation, Indian Territory, all of which was done in the town of Atoka, Central Judicial District, on the 15th day of April, 1903; all of which was done after the said Land Office was duly opened for business and before any selection of land made by any member of the Choctaw or Chickasaw Tribes or Nations, or by any Choctaw or Chickasaw Freedman, as his allotment, had been registered by said Commission to the Five Civilized Tribes; and I further certify that the said W. E. Stanley and Thomas B. Needles and Clifton R. Breckenridge, members of the Commission to the Five Civilized Tribes, were not found in the said Central Judicial District of the Indian Territory.

In Witness Whereof, I have hereunto set my hand this 15th day of April, 1903.

B. F. HACKETT,
United States Marshal.
By G. L. MILLER, Deputy.

EXHIBIT 23

To the Honorable G. W. Dukes, Principal Chief Choctaw Nation:

You are hereby notified that the Missouri, Kansas and Texas Railway Company, a corporation incorporated and organized under and by virtue of the laws of the State of Kansas, claims every alternate section of land or parts thereof designated by odd numbers to the extent of ten sections per mile on each side of its line of railroad through the Choctaw Nation, within twenty miles from the line of said road, and that said claim is based upon an act of Congress entitled, "An Act granting lands to the State of Kansas to aid in the Construction of the Kansas and Neosho Valley Railroad and its Extension to Red River," approved July 25, 1866, and published in Volume Fourteen of the United States Statutes at Large, pages two hundred and thirty-six to two hundred and thirty-nine, inclusive, and sections one, eight, nine and eleven of which said act are as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of aiding the Kansas and Neosho Valley Railroad Company, the same being a corporation organized under the laws of the State of Kansas, to construct and operate a railroad from the eastern terminus of the Union Pacific Railroad, eastern division, at the line between Kansas and Missouri, at or near the mouth of the Kansas River, on the south side thereof, southwardly, through the eastern tier of counties in Kansas, with a view of its extension, so as to effect a junction at Red River with a railroad now being constructed from Galveston to Red River at or near Preston, in Texas, there is hereby granted to the

State of Kansas, for the use and benefit of said railroad company, every alternate section of land or parts thereof, designated by odd numbers, to the extent of ten sections per mile on each side of said road, to be selected within twenty miles *from* (of) the line of said road; but in case it shall appear that the United States has, when the line of said road is definitely located, sold any section, or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid, from the public lands of the United States nearest to the sections above specified, so much land as shall be equal to the amount of such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached as aforesaid, which lands, thus indicated by the direction of the Secretary of the Interior shall be reserved and held for the State of Kansas for the use of such company by the said Secretary for the purpose of the construction and operation of said railroad, as provided by this act: Provided, That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby, reserved and excepted from the operation of this act, except so far as it may be found necessary to locate the route of said road through such reserved lands, in which case the right of way two hundred feet in width is hereby granted, subject to the approval of the President of the United States: And provided further, That none of the

lands hereby granted shall be selected beyond twenty miles from the said road.

"SEC. 8. And be it further enacted, That said Kansas and Neosho Valley Railroad Company, its successors and assigns, is hereby authorized and empowered to extend and construct its railroad from the southern boundary of Kansas south, through the Indian Territory, to Red River, at or near Preston, in the State of Texas, so as to connect with the railway now being constructed from Galveston to a point at or near Preston, in said state; and the right of way through the Indian Territory, wherever such right is now reserved or may hereafter be reserved to the United States by treaty with the Indian tribes, is hereby granted to said Company, to the same extent as granted by the sixth section of this act through the public lands; and in all cases where the right of way, as aforesaid, through the Indian lands, shall not be reserved to the government, the said company shall, before constructing its road, procure the consent of the tribe or tribes interested, which consent, with all its terms and conditions, shall be previously approved and indorsed by the President and filed with the Secretary of the Interior.

"SEC. 9. And be it further enacted, That the same grants of land through said Indian Territory are hereby made as provided in the first section of this act, whenever the Indian title shall be extinguished by treaty or otherwise, not to exceed the ratio per mile granted in the first section of this act: Provided, That said lands become a part of the public lands of the United States.

"SEC. 11. And be it further enacted, That any railroad company chartered under any law of the United States, or of the State of Kansas, which may have been

heretofore or shall hereafter be recognized and subsidized by any act of the Congress of the United States, may connect, unite, and consolidate with this railroad company, after the same shall be located to the valley of the Neosho River, upon just, fair, and equitable terms, to be agreed upon between the parties, and shall not be against the public interest or the interest of the United States; nor shall any road authorized to connect as aforesaid charge the road a greater tariff per mile for freight or passengers than is charged for the same per mile by its own road: And provided further, That should the Leavenworth, Lawrence and Fort Gibson Railroad Company, or the Union Pacific Railroad Company, southern branch, construct and complete its road to that point on the southern boundary of the State of Kansas where the line of said Kansas and Neosho Valley Railroad shall cross the same, before the said Kansas and Neosho Valley Railroad Company shall have constructed and completed its said road to said point, then and in that event the company so first reaching in completion the said point on the southern boundary of the State of Kansas shall be authorized, upon obtaining the written approval of the President of the United States, to construct and operate its line of railroad from said point to a point at or near Preston, in the State of Texas, with grants of land according to the provisions of this act, but upon the further special condition, nevertheless, that said railroad company shall have commenced in good faith the construction thereof before the said Kansas and Neosho Valley Railroad Company shall have completed its said railroad to said point: And provided further, That said other railroad company, so having commenced said work in good faith, shall continue to prosecute the same with sufficient energy to insure the completion of the same within a reasonable time, subject to the approval

of the President of the United States: And provided further, That the right of way through private property when not otherwise provided for in this act, or by the law of any state through which the road may pass, shall be obtained by said Kansas and Neosho Valley Railroad Company, or either of the other companies named in this act, in accordance with the provisions of section three of an act to amend an act entitled 'An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military and other purposes,' approved July first, eighteen hundred and sixty-three.

"Approved, July 25, 1866."

Said Missouri, Kansas and Texas Railway Company further respectfully shows that it is the same corporation mentioned in said section eleven of said act of Congress herein quoted as "Union Pacific Railroad Company, southern branch," its corporate name having since been changed to "Missouri, Kansas and Texas Railway Company," and that it, in accordance with the provisions of said act of Congress, and said section eleven thereof, obtained the written approval of the President of the United States to construct and operate its line of railroad from the point on the southern boundary of the State of Kansas, indicated in said act, to the point at or near Preston, in the State of Texas, also indicated in said act, and has since the construction of its line of railroad between said points, in accordance with the said approval of the President of the United States, operated its said line of railroad between said points, in accordance with the approval of the President of the United States and said act of Congress hereinabove referred to.

And the said Missouri, Kansas and Texas Railway Company respectfully demands that you do not execute or deliver to any person any deed to or conveyance of, either as an allotment or as a town lot, or on any other account or for any other purpose, any of the sections of land, or any part thereof, hereinabove referred to as being claimed by the said Missouri, Kansas and Texas Railway Company, in accordance with the provisions of said act of Congress approved July twenty-fifth, eighteen hundred and sixty-six, as hereinabove mentioned.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY,

By

Its Attorneys.

Muskogee, Indian Territory, August 2d, 1901.

EXHIBIT 24

To the Honorable Green McCurtain, Principal Chief, Choctaw Nation:

You are hereby notified that the Missouri, Kansas and Texas Railway Company, a corporation, organized and existing under and by virtue of the laws of the State of Kansas, claims every alternate section of land, or parts thereof, designated by odd numbers to the extent of ten sections per mile on each side of its main line of railroad through the Choctaw Nation, within twenty miles from the line of said road, and that said claim is based upon an act of Congress entitled, "An Act granting Lands to the State of Kansas to aid in the Construction of the Kansas and Neosho Valley Railroad and its Extension to Red River," approved July 25, 1866, and published in Volume Fourteen of the United States Statutes at Large, pages two hundred and thirty-six to two hundred and thirty-nine, inclusive, and sections one, eight, nine and eleven of which said act are as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of aiding the Kansas and Neosho Valley Railroad Company, the same being a corporation organized under the laws of the State of Kansas, to construct and operate a railroad from the eastern terminus of the Union Pacific Railroad, eastern division, at the line between Kansas and Missouri, at or near the mouth of the Kansas River, on the south side thereof, southwardly, through the eastern tier of counties in Kansas, with a view of its extension, so as to effect a junction at Red River with a railroad now being constructed from Galveston to Red River at or

near Preston, in Texas, there is hereby granted to the State of Kansas, for the use and benefit of said railroad company, every alternate section of land or parts thereof, designated by odd numbers, to the extent of ten sections per mile on each side of said road, to be selected within twenty miles *from* (of) the line of said road; but in case it shall appear that the United States have, when the line of said road is definitely located, sold any section, or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid from the public lands of the United States nearest to the sections above specified, so much land as shall be equal to the amount of such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached as aforesaid, which lands, thus indicated by the direction of the Secretary of the Interior, shall be reserved and held for the State of Kansas for the use of said company by the said Secretary for the purpose of the construction and operation of said railroad, as provided by this act: Provided, That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby, reserved and excepted from the operation of this act, except so far as it may be found necessary to locate the route of said road through such reserved lands, in which case the right of way two hundred feet in width is hereby granted, subject to the approval of the President of the United States: And provided further, That none of the lands hereby granted

shall be selected beyond twenty miles from the said road.

"SEC. 8. And be it further enacted, That said Kansas and Neosho Valley Railroad Company, its successors and assigns, is hereby authorized and empowered to extend and construct its railroad from the southern boundary of Kansas south, through the Indian Territory, to Red River, at or near Preston, in the State of Texas, so as to connect with the railway now being constructed from Galveston to a point at or near Preston, in said State; and the right of way through the Indian Territory, wherever such right is now reserved or may hereafter be reserved to the United States by treaty with the Indian tribes, is hereby granted to said company, to the same extent as granted by the sixth section of this act through the public lands; and in all cases where the right of way, as aforesaid, through the Indian lands, shall not be reserved to the government, the said company shall, before constructing its road, procure the consent of the tribe or tribes interested, which consent, with all its terms and conditions, shall be previously approved and indorsed by the President and filed with the Secretary of the Interior.

"SEC. 9. And be it further enacted, That the same grants of lands through said Indian Territory are hereby made as provided in the first section of this act, whenever the Indian title shall be extinguished by treaty or otherwise, not to exceed the ratio per mile granted in the first section of this act: Provided, That said lands become a part of the public lands of the United States.

"SEC. 11. And be it further enacted, That any railroad company chartered under any law of the United States, or of the State of Kansas, which may have been

heretofore or shall hereafter be recognized and subsidized by any act of the Congress of the United States, may connect, unite, and consolidate with this railroad company, after the same shall be located to the valley of the Neosho River, upon just, fair, and equitable terms, to be agreed upon between the parties, and shall not be against the public interest or the interest of the United States; nor shall any road authorized to connect as aforesaid charge the road so connecting a greater tariff per mile for freight or passengers than is charged for the same per mile by its own road: And provided further, That should the Leavenworth, Lawrence and Fort Gibson Railroad Company, or the Union Pacific Railroad Company, southern branch, construct and complete its road to that point on the southern boundary of the State of Kansas where the line of said Kansas and Neosho Valley Railroad shall cross the same, before the said Kansas and Neosho Valley Railroad Company shall have constructed and completed its said road to said point, then and in that event the company so first reaching in completion the said point on the southern boundary of the State of Kansas shall be authorized, upon obtaining the written approval of the President of the United States, to construct and operate its line of railroad from said point to a point at or near Preston, in the State of Texas, with grants of land according to the provisions of this act, but upon the further special condition, nevertheless, that said railroad company shall have commenced in good faith the construction thereof before the said Kansas and Neosho Valley Railroad Company shall have completed its said railroad to said point: And provided further, That said other railroad company, so having commenced said work in good faith, shall continue to prosecute the same with sufficient energy to insure the completion of the same within a reasonable time, subject

to the approval of the President of the United States: And provided further, That the right of way through private property when not otherwise provided for in this act, or by the law of any State through which the road may pass, shall be obtained by said Kansas and Neosho Valley Railroad Company, or either of the other companies named in this act, in accordance with the provisions of section three of an act to amend an act entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes,' approved July first, eighteen hundred and sixty-two.

"Approved, July 25, 1866."

Said Missouri, Kansas and Texas Railway Company further respectfully shows that it is the same corporation mentioned in said section eleven of said act of Congress hereinabove quoted as "Union Pacific Railroad Company, southern branch," its corporate name having since been changed to "Missouri, Kansas and Texas Railway Company," and that it, in accordance with the provisions of said act of Congress, and said section eleven thereof, obtained the written approval of the President of the United States to construct and operate its line of railroad from the point on the southern boundary of the State of Kansas, indicated in said act, to the point at or near Preston, in the State of Texas, also indicated in said act, and has since the construction of its line of railroad between said points, in accordance with the said approval of the President of the United States, operated its said line of railroad between said points, in accordance with the approval of the President of the United States and said act of Congress hereinabove referred to.

And the said Missouri, Kansas and Texas Railway Company respectfully demands that you do not execute or deliver to any person any deed to or conveyance of, either as an allotment or as a town lot, or on any other account or for any other purpose, any of the sections of land, or any part thereof, hereinabove referred to as being claimed by the said Missouri, Kansas and Texas Railway, in accordance with the provisions of said act of Congress approved July twenty-fifth, eighteen hundred and sixty-six, as hereinabove mentioned.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY,

By

JAMES HAGERMAN and
CLIFFORD L. JACKSON,
Its Attorneys.

Dated at Muskogee, Indian Territory, November 14, 1902.

UNITED STATES OF AMERICA,)
INDIAN TERRITORY,) ss.
WESTERN DISTRICT,)

E. L. Clark, of lawful age, upon his oath states that he served upon Green McCurtain, Principal Chief Choctaw Nation, the within and foregoing notice by delivering a full, true and correct copy thereof to the said Green McCurtain on the 26th day of November, 1902, all of which was done in the town of Kinta, and said Central Judicial District of the Indian Territory.

E. L. CLARK.

Subscribed and sworn to before me, the undersigned, a Notary Public within and for the Western Judicial District of the Indian Territory, this 1st day of December, 1902.

My commission expires on the 2d day of July, 1906.

ERNEST BROWN, Notary Public.

EXHIBIT 25

To the Honorable Thomas W. Hunter, Principal Chief, Choctaw Nation:

You are hereby notified that the Missouri, Kansas and Texas Railway Company, a corporation, organized and existing under and by virtue of the laws of the State of Kansas, claims every alternate section of land, or parts thereof, designated by odd numbers to the extent of ten sections per mile on each side of its main line of railroad through the Choctaw Nation, within twenty miles from the line of said road, and that said claim is based upon an act of Congress entitled, "An Act granting Lands to the State of Kansas to aid in the Construction of the Kansas and Neosho Valley Railroad and its Extension to Red River," approved July 25, 1866, and published in Volume Fourteen of the United States Statutes at Large, pages two hundred and thirty-six to two hundred and thirty-nine, inclusive, and sections one, eight, nine and eleven of which said act are as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of aiding the Kansas and Neosho Valley Railroad Company, the same being a corporation organized under the laws of the State of Kansas, to construct and operate a railroad from the eastern terminus of the Union Pacific Railroad, eastern division, at the line between Kansas and Missouri, at or near the mouth of the Kansas River, on the south side thereof, southwardly, through the eastern tier of counties in Kansas, with a view of its extension, so as to affect a junction at Red River with a railroad now being constructed from Galveston to Red River at or

near Preston, in Texas, there is hereby granted to the State of Kansas, for the use and benefit of said railroad company, every alternate section of land or parts thereof, designated by odd numbers, to the extent of ten sections per mile on each side of said road, to be selected within twenty miles *from* (of) the line of said road; but in case it shall appear that the United States have, when the line of said road is definately located, sold any section, or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid, from the public lands of the United States nearest to the sections above specified, so much land as shall be equal to the amount of such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached as aforesaid, which lands, thus indicated by the direction of the Secretary of the Interior, shall be reserved and held for the State of Kansas for the use of said company by the said Secretary for the purpose of the construction and operation of said railroad, as provided by this act: Provided, That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby, reserved and exempted from the operation of this act, except so far as it may be found necessary to locate the route of said road through such reserved lands, in which case the right of way two hundred feet in width is hereby granted, subject to the approval of the President of the United States: And provided further, That none of

the lands hereby granted shall be selected beyond twenty miles from the said road.

"SEC. 8. And be it further enacted, That said Kansas and Neosho Valley Railroad Company, its successors and assigns, is hereby authorized and empowered to extend and construct its railroad from the southern boundary of Kansas south, through the Indian Territory, to Red River, at or near Preston, in the State of Texas, so as to connect with the railway now being constructed from Galveston to a point at or near Preston, in said State; and the right of way through the Indian Territory, wherever such right is now reserved or may hereafter be reserved to the United States by treaty with the Indian tribes, is hereby granted to said company, to the same extent as granted by the sixth section of this act through the public lands; and in all cases where the right of way, as aforesaid, through the Indian lands, shall not be reserved to the government, the said company shall, before constructing its road, procure the consent of the tribe or tribes interested, which consent, with all its terms and conditions, shall be previously approved and indorsed by the President and filed with the Secretary of the Interior.

"SEC. 9. And be it further enacted, That the same grants of lands through said Indian Territory are hereby made as provided in the first section of this act, whenever the Indian title shall be extinguished by treaty or otherwise, not to exceed the ratio per mile granted in the first section of this act: Provided, That said lands become a part of the public lands of the United States.

"SEC. 11. And be it further enacted, That any railroad company chartered under any law of the United States, or of the State of Kansas, which may have been

heretofore or shall hereafter be recognized and subsidized by any act of the Congress of the United States, may connect, unite, and consolidate with this railroad company, after the same shall be located to the valley of the Neosho River, upon just, fair and equitable terms, to be agreed upon between the parties, and shall not be against the public interest or the interest of the United States; nor shall any road authorized to connect as aforesaid charge the road so connecting a greater tariff per mile for freight or passengers than is charged for the same per mile by its own road: And provided further, That should the Leavenworth, Lawrence and Fort Gibson Railroad Company, or the Union Pacific Railroad Company, southern branch, construct and complete its road to that point on the southern boundary of the State of Kansas where the line of said Kansas and Neosho Valley Railroad shall cross the same, before the said Kansas and Neosho Valley Railroad Company shall have constructed and completed its said road to said point, then and in that event the company so first reaching in completion the said point on the southern boundary of the State of Kansas shall be authorized, upon obtaining the written approval of the President of the United States, to construct and operate its line of railroad from said point to a point at or near Preston, in the State of Texas, with grants of land according to the provisions of this act, but upon the further special condition, nevertheless, that said railroad company shall have commenced in good faith the construction thereof before the said Kansas and Neosho Valley Railroad Company shall have completed its said railroad to said point: And provided further, That said other railroad company, so having commenced said work in good faith, shall continue to prosecute the same with sufficient energy to insure the completion of the same within a reasonable

time, subject to the approval of the President of the United States: And provided further, That the right of way through private property when not otherwise provided for in this act, or by the law of any State through which the road may pass, shall be obtained by said Kansas and Neosho Valley Railroad Company, or either of the other companies named in this act, in accordance with the provisions of section three of an act to amend an act entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes,' approved July first, eighteen hundred and sixty-two.

"Approved, July 25, 1866."

Said Missouri, Kansas and Texas Railway Company further respectfully shows that it is the same corporation mentioned in said section eleven of said act of Congress hereinabove quoted as "Union Pacific Railroad Company, southern branch," its corporate name having since been changed to "Missouri, Kansas and Texas Railway Company," and that it, in accordance with the provisions of said act of Congress, and said section eleven thereof, obtained the written approval of the President of the United States to construct and operate its line of railroad from the point on the southern boundary of the State of Kansas, indicated in said act, to the point at or near Preston, in the State of Texas, also indicated in said act, and has since the construction of its line of railroad between said points, in accordance with the said approval of the President of the United States, operated its said line of railroad between said points, in accordance with the approval of the President of the United States and said act of Congress hereinabove referred to.

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And the said Missouri, Kansas and Texas Railway Company respectfully demands that you do not execute or deliver to any person any deed to or conveyance of, either as an allotment or as a town lot, or on any other account or for any other purpose, any of the sections of land, or any part thereof, hereinabove referred to as being claimed by the said Missouri, Kansas and Texas Railway Company, in accordance with the provisions of said act of Congress approved July twenty-fifth, eighteen hundred and sixty-six, as hereinabove mentioned.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY,

By

JAMES HAGERMAN and
CLIFFORD L. JACKSON,
Its Attorneys.

Dated at Muskogee, Indian Territory, November 14, 1902.

UNITED STATES OF AMERICA,)
INDIAN TERRITORY,) ss.
WESTERN DISTRICT,)

E. L. Clark, of lawful age, upon his oath states that he served upon Thomas W. Hunter, claiming to be Principal Chief of the Choctaw Nation, the within and foregoing notice by delivering a full, true and correct copy thereof to the said Thomas W. Hunter, on the 29th day of November, 1902, all of which was done in the town of Caddo, and said Central Judicial District of the Indian Territory.

E. L. CLARK.

Subscribed and sworn to before me, the undersigned, a Notary Public within and for the Western Judicial District of the Indian Territory, this 1st day of December, 1902.

My commission expires on the 1st day of July, 1906.

ERNEST BROWN, Notary Public.

EXHIBIT 26

TO THE HONORABLES

JOHN A. STERRETT,
BUTLER S. SMISER,

Members of the Townsite Commission for the Choctaw Nation:

You and each of you are hereby notified that the Missouri, Kansas and Texas Railway Company, a corporation incorporated and organized under and by virtue of the laws of the State of Kansas, claims every alternate section of land, or parts thereof, designated by odd numbers to the extent of ten sections per mile on each side of its line of railroad through the Choctaw Nation, within twenty miles from the line of said road, and that said claim is based upon an Act of Congress entitled, "An Act granting lands to the State of Kansas to aid in the construction of the Kansas and Neosho Valley Railroad, and its Extension to Red River," approved July 25th, 1866, and published in Volume fourteen of the United States Statutes at Large, pages two hundred and thirty-six to two hundred and thirty-nine, inclusive, and sections one, eight, nine and eleven of which said Act are as follows:

SECTION 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of aiding the Kansas and Neosho Valley Railroad Company, the same being a corporation organized under the laws of the State of Kansas, to construct and operate a railroad from the eastern terminus of the Union Pacific Railroad, eastern division, at the line between Kansas and Missouri, at or near the mouth of the Kansas River, on

the south side thereof, southwardly, through the eastern tier of counties in Kansas, with a view of its extension, so as to effect a junction at Red River with a railroad now being constructed from Galveston to Red River at or near Preston, in Texas, there is hereby granted to the State of Kansas, for the use and benefit of said railroad company, every alternate section of land, or parts thereof, designated by odd numbers, to the extent of ten sections per mile on each side of said road, to be selected within twenty miles *from* (of) the line of said road; but in case it shall appear that the United States have, when the line of said road is definitely located, sold any section, or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid, from the public lands of the United States, nearest to the sections above specified, so much land as shall be equal to the amount of such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached as aforesaid, which lands, thus indicated by the direction of the Secretary of the Interior, shall be reserved and held for the State of Kansas for the use of said company by the said Secretary for the purpose of the construction and operation of said railroad, as provided by this Act: Provided, That any and all lands heretofore reserved to the United States by any Act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby, reserved and excepted from the operation of this act, except so far as it may be found necessary to locate the route of

said road through such reserved lands, in which case the right of way two hundred feet in width is hereby granted, subject to the approval of the President of the United States: And provided further, That none of the lands hereby granted shall be selected beyond twenty miles from the said road.

SEC. 8. And be it further enacted, That said Kansas and Neosho Valley Railroad Company, its successors and assigns, is hereby authorized and empowered to extend and construct its railroad from the southern boundary of Kansas south, through the Indian Territory, to Red River, at or near Preston, in the State of Texas, so as to connect with the railway now being constructed from Galveston to a point at or near Preston, in said State; and the right of way through the Indian Territory, wherever such right is now reserved, or may hereafter be reserved to the United States by treaty with the Indian tribes, is hereby granted to said company, to the same extent as granted by the sixth section of this act through the public lands; and in all cases where the right of way, as aforesaid, through the Indian lands, shall not be reserved to the Government, the said company shall, before constructing its road, procure the consent of the tribe or tribes interested, which consent, with all its terms and conditions, shall be previously approved and indorsed by the President and filed with the Secretary of the Interior.

SEC. 9. And be it further enacted, That the same grants of land through said Indian Territory are hereby made as provided in the first section of this act, whenever the Indian title shall be extinguished by treaty or otherwise, not to exceed the ratio per mile granted in the first section of this act: Provided, That said lands shall become a part of the public lands of the United States.

SEC. 11. And be it further enacted, That any railroad company chartered under any law of the United States, or of the State of Kansas, which may have been heretofore or shall hereafter be recognized and subsidized by any Act of the Congress of the United States, may connect, unite, and consolidate with this railroad company, after the same shall be located to the valley of the Neosho River, upon just, fair, and equitable terms, to be agreed upon between the parties, and shall not be against the public interest or the interest of the United States; nor shall any road authorized to connect as aforesaid charge the road so connecting a greater tariff per mile for freight or passengers than is charged for the same per mile by its own road: And provided further, That should the Leavenworth, Lawrence and Fort Gibson Railroad Company, or the Union Pacific Railroad Company, southern branch, construct and complete its road to that point on the southern boundary of the State of Kansas where the line of said Kansas and Neosho Valley Railroad shall cross the same, before the said Kansas and Neosho Valley Railroad Company shall have constructed and completed its said road to said point, then and in that event the company so first reaching in completion the said point on the southern boundary of the State of Kansas shall be authorized, upon obtaining the written approval of the President of the United States, to construct and operate its line of railroad from said point to a point at or near Preston, in the State of Texas, with grants of land according to the provisions of this act, but upon the further special condition, nevertheless, that said railroad company shall have commenced in good faith the construction thereof before the said Kansas and Neosho Valley Railroad Company shall have completed its said railroad to said point: And provided further, That said other railroad company so leaving commenced

said work in good faith, shall continue to prosecute the same with sufficient energy to insure the completion of the same within a reasonable time, subject to the approval of the President of the United States: And provided further, That the right of way through private property when not otherwise provided for in this act, or by the law of any State through which the road may pass, shall be obtained by said Kansas and Neosho Valley Railroad Company, or either of the other companies named in this act, in accordance with the provisions of section three of an act to amend an act, entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes," approved July first, eighteen hundred and sixty-six.

Said Missouri, Kansas and Texas Railway Company further respectfully shows that it is the same corporation mentioned in section eleven of said Act of Congress hereinabove quoted as "Union Pacific Railroad Company, southern branch," its corporate name having since been changed to "Missouri, Kansas and Texas Railway Company," and that it, in accordance with the provisions of said Act of Congress, and said section eleven thereof, obtained the written approval of the President of the United States to construct and operate its line of railroad from the point on the southern boundary of the State of Kansas, indicated in said act, to the point at or near Preston, in the State of Texas, also indicated in said act, and has since the construction of its line of railroad between said points, in accordance with the said approval of the President of the United States, operated its said line of railroad between said points, in accordance with said approval of the President of the United States, and said act of Congress hereinabove referred to.

And the said Missouri, Kansas and Texas Railway Company respectfully demands that you do not cause to be surveyed or laid out in the Choctaw Nation for any townsite or townsites, or any part or parts thereof, any of the sections of land, or any part or parts of any such section or sections of land hereinabove referred to, as being claimed by the said Missouri, Kansas and Texas Railway Company, in accordance with the provisions of said Act of Congress, approved July 25th, 1866, and hereinabove mentioned.

THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY,

By

JAMES HAGERMAN and
CLIFFORD JACKSON,

Its Attorneys.

Cale, Indian Territory, June the sixteenth, 1899.

UNITED STATES OF AMERICA,)
INDIAN TERRITORY,) ss.
CENTRAL JUDICIAL DISTRICT.)

F. E. Guild, being duly sworn, upon his oath states that he served the above and foregoing notice by delivering full, true and correct copies thereof to each John A. Sterrett and Butler S. Smiser, members of the Townsite Commission for the Choctaw Nation, all of which was done at Cale, in said above named district and Territory on the sixteenth day of June, A. D. 1899.

F. E. GUILD.

Subscribed and sworn to before me this 28th day of June, A. D. 1899.

JAS. A. WINSTON,
Clerk U. S. Court N. D. I. T.
By N. S. YOUNG, D. C.

EXHIBIT 27

TO THE HONORABLES

TAMS BIXBY, CHAIRMAN,
CLIFTON R. BRECKENRIDGE,
THOMAS B. NEEDLES, and
WILLIAM E. STANLEY,

Members of the Commission to the Five Civilized Tribes,

AND TO THE OFFICERS,

In charge of the office established by the said Commission at Tishomingo, in the Chickasaw Nation, Indian Territory, for the purpose of allotting the lands in the Choctaw and Chickasaw Nations, in accordance with an Act of Congress entitled "An Act for the protection of the people of the Indian Territory, and for other purposes," approved June 28, 1898, which was ratified and adopted at an election of the Choctaw and Chickasaw Tribes or Nations of Indians, and in accordance with an Act of Congress entitled "An Act to ratify and confirm an agreement with the Choctaw and Chickasaw Tribes or Nations of Indians, and for other purposes," approved July 1, 1902, which was also ratified and adopted by the said Choctaw and Chickasaw Tribes of Indians, and under the regulations made in accordance with both of said Acts:

You, and each of you, are hereby notified that the Missouri, Kansas and Texas Railway Company, a cor-

poration incorporated and organized under and by virtue of the laws of the State of Kansas, claims every alternate section of land or parts thereof, designated by odd numbers, to the extent of ten sections per mile on each side of its line of railroad through the Choctaw and Chickasaw Nations, within twenty miles of the line of said road; and in case it shall appear that the United States had, when the line of said road was definitely located, sold any of said sections, or any part thereof, or that the right of pre-emption or homestead settlement had attached to the same, or that the same had been reserved by the United States for any purpose whatever, then the said Missouri, Kansas and Texas Railway Company claims from the lands nearest to the sections above specified, so much land as shall be equal to the amount of such lands as the United States has sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or pre-emption had attached, and that said claim is based upon an Act of Congress entitled "An Act granting Lands to the State of Kansas to aid in the Construction of the Kansas and Neosho Valley Railroad, and its Extension to Red River," approved July 25, 1866, and published in volume fourteen of the United States Statutes at Large, pages two hundred and thirty-six to two hundred and thirty-nine, inclusive, and sections one, eight, nine and eleven of which said Act are as follows:

SECTION 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of aiding the Kansas and Neosho Valley Railroad Company, the same being a corporation organized under the laws of the State of Kansas, to construct and operate a railroad from the eastern terminus of the Union Pacific Railroad, eastern division, at the line between Kansas and

Missouri, at or near the mouth of the Kansas River, on the south side thereof, southwardly, through the eastern tier of counties in Kansas, with a view of its extension, so as to effect a junction at Red River with a railroad now being constructed from Galveston to Red River at or near Preston, in Texas, there is hereby granted to the State of Kansas, for the use and benefit of said railroad company, every alternate section of land or parts thereof, designated by odd numbers, to the extent of ten sections per mile on each side of said road; but in case it shall appear that the United States have, when the line of said road is definitely located, sold any section, or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid, from the public lands of the United States nearest to the sections above specified, so much land as shall be equal to the amount of such lands as the United States have sold, reserved, or otherwise appropriated, or to which the rights of homestead settlement or pre-emption has attached as aforesaid, which lands, thus indicated by the direction of the Secretary of the Interior, shall be reserved and held for the State of Kansas for the use of said company by the said Secretary for the purpose of the construction and operation of said railroad, as provided by this act: *Provided*, That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority for the purpose of aiding in any object of internal improvement or other object whatever, be, and the same are hereby, reserved and excepted from the operation of this act, except so far as it may be found necessary to locate the route of said road through such re-

served lands, in which case the right of way two hundred feet in width is hereby granted, subject to the approval of the President of the United States: *And provided further*, That none of the lands hereby granted shall be selected beyond twenty miles from the said road.

SEC. 3. And be it further enacted, That said Kansas and Neosho Valley Railroad Company, its successors and assigns, is hereby authorized and empowered to construct its railroad from the southern boundary of Kansas south, through the Indian Territory, to Red River, at or near Preston, in the State of Texas, so as to connect with the railway now being constructed from Galveston to a point at or near Preston, in said State; and the right of way through the Indian Territory, wherever such right is now reserved or may hereafter be reserved to the United States by treaty with the Indian tribes, is hereby granted to said company, to the same extent as granted by the sixth section of this act through the public lands; and in all cases where the right of way, as aforesaid, through the Indian lands, shall not be reserved to the government, the said company shall, before constructing its road, procure the consent of the tribe or tribes interested, which consent, with all its terms and conditions, shall be previously approved and indorsed by the President and filed with the Secretary of the Interior.

SEC. 9. And be it further enacted, That the same grants of lands through said Indian Territory are hereby made as provided in the first section of this act, whenever the Indian title shall be extinguished by treaty or otherwise, not to exceed the ratio per mile granted in the first section of this act: *Provided*, That said lands become a part of the public lands of the United States.

SEC. 11. And be it further enacted, That any railroad company chartered under any law of the United States, or of the State of Kansas, which may have been heretofore or shall hereafter be recognized and subsidized by any act of the Congress of the United States, may connect, unite, and consolidate with this railroad company, after the same shall be located to the valley of the Neosho River, upon just, fair, and equitable terms, to be agreed upon between the parties, and shall not be against the public interest or the interest of the United States; nor shall any road authorized to connect as aforesaid charge the road so connecting a greater tariff per mile for freight or passengers than is charged for the same per mile by its own road: *And provided further*, That should the Leavenworth, Lawrence, and Fort Gibson Railroad Company, or the Union Pacific Railroad Company, southern branch, construct and complete its road to that point on the southern boundary of the State of Kansas where the line of said Kansas and Neosho Valley Railroad shall cross the same, before the said Kansas and Neosho Valley Railroad Company shall have constructed and completed its said road to said point, then and in that event the company so first reaching in completion the said point on the southern boundary of the State of Kansas shall be authorized, upon obtaining the written approval of the President of the United States, to construct and operate its line of railroad from said point to a point at or near Preston, in the State of Texas, with grants of land according to the provisions of this act, but upon the further special condition, nevertheless, that said railroad company shall have commenced in good faith the construction thereof before the said Kansas and Neosho Valley Railroad Company shall have completed its said railroad to said point: *And provided further*, That said other railroad company, so

having commenced said work in good faith shall continue to prosecute the same with sufficient energy to insure the completion of the same within a reasonable time, subject to the approval of the President of the United States: *And provided further*, That the right of way through private property when not otherwise provided for in this act, or by the law of any State through which the road may pass, shall be obtained by said Kansas and Neosho Valley Railroad Company, or either of the other companies named in this act, in accordance with the provisions of section three of an act to amend an act entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes," approved July first, eighteen hundred and sixty-two.

Said Missouri, Kansas and Texas Railway Company further respectfully shows that it is the same corporation mentioned in section eleven of said Act of Congress hereinabove quoted as "Union Pacific Railroad Company, Southern Branch," its corporate name having since been changed to "Missouri, Kansas and Texas Railway Company," and that it, in accordance with the provisions of said act of Congress, and said section eleven thereof, obtained the written approval of the President of the United States to construct and operate its line of railroad from the point on the southern boundary of the State of Kansas, indicated in said Act, to the point at or near Preston, in the State of Texas, also indicated in said Act, and has, since the construction of its line of railroad between said points, in accordance with the said approval of the President of the United States, operated its said line of railroad between said points, in accordance with said approval

of the President of the United States, and said Act of Congress hereinabove referred to.

And said Missouri, Kansas and Texas Railway Company respectfully demands that the sections of land hereinabove referred to as being claimed by the said Missouri, Kansas and Texas Railway Company, in accordance with the provisions of said Act of Congress approved July 25, 1866, and hereinabove mentioned, be allotted to the Missouri, Kansas and Texas Railway Company, and that none of said sections, or any parts thereof, be allotted to any person whomsoever, and that you do not register any selection of any land covered by any of the sections hereinabove shown to be claimed by the said Missouri, Kansas and Texas Railway Company, made by any member of said Choctaw or Chickasaw Tribes or Nations, or any Choctaw or Chickasaw Freedmen, for his allotment, and that you do not receive any application from any member of said Tribes or Nations, or any Choctaw or Chickasaw Freedmen, in which is described any land hereinabove shown to be claimed by said Missouri, Kansas and Texas Railway Company.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY,

By

JAMES HAGERMAN and
CLIFFORD L. JACKSON,
Its Attorneys.

Dated at Tishomingo, Indian Territory, April 15, 1903.

UNITED STATES OF AMERICA,)
..... DISTRICT,) ss.
INDIAN TERRITORY,)

I, the undersigned, B. F. Hackett, United States Marshal within and for the Central District of the Indian Territory, hereby certify that I served the within and foregoing notice by delivering a full, true and correct copy of the same to Tams Bixby, at 8:40 o'clock a. m., as Chairman, and ..... at .... o'clock .. m., and ....., at .... o'clock .. m., and ....., at .... oclock .. m., as members of the Commission to the Five Civilized Tribes, and W. O. Beall, at 8:40 o'clock a. m., and ....., at .... o'clock .. m., as officer in charge of the Land Office established by the Commission to the Five Civilized Tribes at Tishomingo, in the Chickasaw Nation, Indian Territory, all of which was done in the town of Atoka, Central Judicial District, on the 15th day of April, 1903; all of which was done after the said Land Office was duly opened for business and before any selection of land made by any member of the Choctaw or Chickasaw Tribes or Nations, or by any Choctaw or Chickasaw Freedman as his allotment, had been registered by said Commission to the Five Civilized Tribes; and I further certify that the said ....., as Chairman, and Thomas B. Needles, and William E. Stanley, and Clifton R. Breckenridge, members of the Commission to the Five Civilized Tribes, or any of the officers in charge of the Land Office established by said Commission in the town of Tishomingo, in the Chickasaw Nation, Indian Territory, were not found in the said Central Judicial District of the Indian Territory.

In Witness Whereof, I have hereunto set my hand this 15th day of April, 1903. B. F. HACKETT,
United States Marshal.
By G. L. MILLER, Deputy.

EXHIBIT 28

To the Honorable Palmer S. Moseley, Governor, Chickasaw Nation:

You are hereby notified that the Missouri, Kansas and Texas Railway Company, a corporation, organized and existing under and by virtue of the laws of the State of Kansas, claims every alternate section of land, or parts thereof, designated by odd numbers to the extent of ten sections per mile on each side of its main line of railroad through the Chickasaw Nation, within twenty miles from the line of said road, and that said claim is based upon an act of Congress entitled, "An Act granting lands to the State of Kansas to aid in the construction of the Kansas and Neosho Valley Railroad and its Extension to Red River," approved July 25, 1866, and published in Volume Fourteen of the United States Statutes at Large, pages two hundred and thirty-six to two hundred and thirty-nine, inclusive, and sections one, eight, nine and eleven of which said act are as follows:

"Be it Enacted by the Senate and House of Representatives of the United States of America in Congress Assembled,

That for the purpose of aiding the Kansas and Neosho Valley Railroad Company, the same being a corporation organized under the laws of the State of Kansas, to construct and operate a railroad from the eastern terminus of the Union Pacific Railroad, eastern division, at the line between Kansas and Missouri, at or near the mouth of the Kansas River, on the south side thereof, southwardly, through the eastern tier of counties in Kansas, with a view of its extension, so as to affect a junction at Red River with a railroad now

being constructed from Galveston to Red River at or near Preston, in Texas, there is hereby granted to the State of Kansas, for the use and benefit of said railroad company, every alternate section of land or parts thereof, designated by odd numbers, to the extent of ten sections per mile on each side of said road, to be selected within twenty miles *from* (of) the line of said road; but in case it shall appear that the United States has, when the line of said road is definitely located, sold any section, or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United Sates for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid, from the public lands of the United States nearest to the sections above specified, so much land as shall be equal to the amount of such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or preemption has attached as aforesaid, which lands, thus indicated by the direction of the Secretary of the Interior, shall be reserved and held for the State of Kansas for the use of such company by the said Secretary for the purpose of the construction and operation of said railroad, as provided by this act: *Provided*, That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby, reserved and excepted from the operation of this act except so far as it may be found necessary to locate the route of said road through such reserved lands, in which case the right of way two hundred feet in width is hereby granted, subject to the approval of the President of

the United States: *And provided further*, That none of the lands hereby granted shall be selected beyond twenty miles from the said road.

SEC. 8. And be it further enacted, That said Kansas and Neosho Valley Railroad Company, its successors and assigns, is hereby authorized and empowered to extend and construct its railroad from the southern boundary of Kansas south, through the Indian Territory, to Red River, at or near Preston, in the State of Texas, so as to connect with the railway now being constructed from Galveston to a point at or near Preston, in said State; and the right of way through the Indian Territory, wherever such right is now reserved or may hereafter be reserved to the United States by treaty with the Indian tribes, is hereby granted to said company, to the same extent as granted by the sixth section of this act through the public lands; and in all cases where the right of way, as aforesaid, through the Indian lands, shall not be reserved to the government, the said company shall, before constructing its road, procure the consent of the tribe or tribes interested, which consent, with all its terms and conditions, shall be previously approved and indorsed by the President and filed with the Secretary of the Interior.

SEC. 9. And be it further enacted, That the same grants of lands through said Indian Territory are hereby made as provided in the first section of this act, whenever the Indian title shall be extinguished by treaty or otherwise, not to exceed the ratio per mile granted in the first section of this act: *Provided*, That said lands become a part of the public lands of the United States.

SEC. 11. And be it further enacted, That any railroad company chartered under any law of the United

States, or of the State of Kansas, which may have been heretofore or shall hereafter be recognized and subsidized by any act of the Congress of the United States, may connect, unite, and consolidate with this railroad company, after the same shall be located to the valley of the Neosho River, upon just, fair, and equitable terms, to be agreed upon between the parties, and shall not be against the public interest or the interest of the United States; nor shall any road authorized to connect as aforesaid charge the road so connecting a greater tariff per mile for freight or passengers than is charged for the same per mile by its own road: *And provided further*, That should the Leavenworth, Lawrence, and Fort Gibson Railroad Company, or the Union Pacific Railroad Company, southern branch, construct and complete its road to that point on the southern boundary of the State of Kansas where the line of said Kansas and Neosho Valley Railroad shall cross the same, before the said Kansas and Neosho Valley Railroad Company shall have constructed and completed its said road to said point, then and in that event the company so first reaching in completion the said point on the southern boundary of the State of Kansas shall be authorized, upon obtaining the written approval of the President of the United States, to construct and operate its line of railroad from said point to a point at or near Preston, in the State of Texas, with grants of land according to the provisions of this act, but upon the further special condition, nevertheless, that said railroad company shall have commenced in good faith the construction thereof before the said Kansas and Neosho Valley Railroad Company shall have completed its said railroad to said point: *And provided further*, That said other railroad company, so having commenced said work in good faith, shall continue to prosecute the same with sufficient energy to insure the completion of the

same within a reasonable time, subject to the approval of the President of the United States: *And provided further*, That the right of way through private property when not otherwise provided for in this act, or by the law of any State through which the road may pass, shall be obtained by said Kansas and Neosho Valley Railroad Company, or either of the other companies named in this act, in accordance with the provisions of section three of an act to amend an act entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes," approved July first, eighteen hundred and sixty-two.

Approved, July 25, 1866.

Said Missouri, Kansas and Texas Railway Company further respectfully shows that it is the same corporation mentioned in said section eleven of said act of Congress hereinabove quoted as "Union Pacific Railroad Company, southern branch,' its corporate name having since been changed to "Missouri, Kansas and Texas Railway Company," and that it, in accordance with the provisions of said act of Congress, and said section eleven thereof, obtained the written approval of the President of the United States to construct and operate its line of railroad from the point on the southern boundary of the State of Kansas, indicated in said act, to the point at or near Preston, in the State of Texas, also indicated in said act, and has since the construction of its line of railroad between said points, in accordance with the said approval of the President of the United States, operated its said line of railroad between said points, in accordance with the approval of the President of the United States and said act of Congress hereinabove referred to.

And the said Missouri, Kansas and Texas Railway Company respectfully demands that you do not execute or deliver to any person any deed to or conveyance of, either as an allotment or as a town lot, or on any other account or for any other purpose, any of the sections of land, or any part thereof, hereinabove referred to as being claimed by the said Missouri, Kansas and Texas Railway Company, in accordance with the provisions of said act of Congress approved July twenty-fifth, eighteen hundred and sixty-six, as hereinabove mentioned.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY,

By

JAMES HAGERMAN and
CLIFFORD L. JACKSON,
Its Attorneys.

Dated at Muskogee, Indian Territory, November 14, 1902.

UNITED STATES OF AMERICA,)
INDIAN TERRITORY,) ss.
WESTERN DISTRICT,)

E. L. Clark, of lawful age, upon his oath states that he served upon Palmer S. Moseley, Governor Chickasaw Nation, the within and foregoing notice by delivering a full, true and correct copy thereof to the said Palmer S. Moseley, on the 25th day of November, 1902, all of which was done in the town of Wapanucka, and said Southern Judicial District of the Indian Territory.

E. L. CLARK.

Subscribed and sworn to before me, the undersigned, a Notary Public within and for the Western Judicial District of the Indian Territory, this 1st day of December, 1902.

My commission expires on the 2d day of July, 1906.

ERNEST BROWN, Notary Public.

EXHIBIT 29

To the Honorable D. H. Johnston, Governor Chickasaw Nation:

You are hereby notified that the Missouri, Kansas and Texas Railway Company, a corporation, organized and existing under and by virtue of the laws of the State of Kansas, claims every alternate section of land, or parts thereof, designated by odd numbers to the extent of ten sections per mile on each side of its main line of railroad through the Chickasaw Nation, within twenty miles from the line of said road, and that said claim is based upon an act of Congress entitled, "An Act granting lands to the State of Kansas to aid in the construction of the Kansas and Neosho Valley Railroad and its Extension to Red River," approved July 25, 1866, and published in Volume Fourteen of the United States Statutes at Large, pages two hundred and thirty-six to two hundred and thirty-nine, inclusive, and sections one, eight, nine and eleven of which said act are as follows:

"Be it Enacted by the Senate and House of Representatives of the United States of America in Congress Assembled,

That for the purpose of aiding the Kansas and Neosho Valley Railroad Company, the same being a corporation organized under the laws of the State of Kansas, to construct and operate a railroad from the eastern terminus of the Union Pacific Railroad, eastern division, at the line between Kansas and Missouri, at or near the mouth of the Kansas River, on the south side thereof, southwardly, through the eastern tier of counties in Kansas, with a view of its extension, so as to affect a junction at Red River with a railroad now

being constructed from Galveston to Red River at or near Preston, in Texas, there is hereby granted to the State of Kansas, for the use and benefit of said railroad company, every alternate section of land or parts thereof, designated by odd numbers, to the extent of ten sections per mile on each side of said road, to be selected within twenty miles *from* (of) the line of said road; but in case it shall appear that the United States has, when the line of said road is definitely located, sold any section, or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United Sates for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid, from the public lands of the United States nearest to the sections above specified, so much land as shall be equal to the amount of such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached as aforesaid, which lands, thus indicated by the direction of the Secretary of the Interior, shall be reserved and held for the State of Kansas for the use of such company by the said Secretary for the purpose of the construction and operation of said railroad, as provided by this act: *Provided*, That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby, reserved and excepted from the operation of this act except so far as it may be found necessary to locate the route of said road through such reserved lands, in which case the right of way two hundred feet in width is hereby granted, subject to the approval of the President of

the United States: *And provided further,* That none of the lands hereby granted shall be selected beyond twenty miles from the said road.

SEC. 8. And be it further enacted, That said Kansas and Neosho Valley Railroad Company, its successors and assigns, is hereby authorized and empowered to extend and construct its railroad from the southern boundary of Kansas south, through the Indian Territory, to Red River, at or near Preston, in the State of Texas, so as to connect with the railway now being constructed from Galveston to a point at or near Preston, in said State; and the right of way through the Indian Territory, wherever such right is now reserved or may hereafter be reserved to the United States by treaty with the Indian tribes, is hereby granted to said company, to the same extent as granted by the sixth section of this act through the public lands; and in all cases where the right of way, as aforesaid, through the Indian lands, shall not be reserved to the government, the said company shall, before constructing its road, procure the consent of the tribe or tribes interested, which consent, with all its terms and conditions, shall be previously approved and indorsed by the President and filed with the Secretary of the Interior.

SEC. 9. And be it further enacted, That the same grants of lands through said Indian Territory are hereby made as provided in the first section of this act, whenever the Indian title shall be extinguished by treaty or otherwise, not to exceed the ratio per mile granted in the first section of this act: *Provided*, That said lands become a part of the public lands of the United States.

SEC. 11. And be it further enacted, That any railroad company chartered under any law of the United States, or of the State of Kansas, which may have been

heretofore or shall hereafter be recognized and subsidized by any act of the Congress of the United States, may connect, unite, and consolidate with this railroad company, after the same shall be located to the valley of the Neosho River, upon just, fair, and equitable terms, to be agreed upon between the parties, and shall not be against the public interest or the interest of the United States; nor shall any road authorized to connect as aforesaid charge the road so connecting a greater tariff per mile for freight or passengers than is charged for the same per mile by its own road: *And provided further*, That should the Leavenworth, Lawrence, and Fort Gibson Railroad Company, or the Union Pacific Railroad Company, southern branch, construct and complete its road to that point on the southern boundary of the State of Kansas where the line of said Kansas and Neosho Valley Railroad shall cross the same, before the said Kansas and Neosho Valley Railroad Company shall have constructed and completed its said road to said point, then and in that event the company so first reaching in completion the said point on the southern boundary of the State of Kansas shall be authorized, upon obtaining the written approval of the President of the United States, to construct and operate its line of railroad from said point to a point at or near Preston, in the State of Texas, with grants of land according to the provisions of this act, but upon the further special condition, nevertheless, that said railroad company shall have commenced in good faith the construction thereof before the said Kansas and Neosho Valley Railroad Company shall have completed its said railroad to said point: *And provided further*, That said other railroad company, so having commenced said work in good faith, shall continue to prosecute the same with sufficient energy to insure the completion of the same within a reasonable time, subject to the approval

of the President of the United States: *And provided further*, That the right of way through private property when not otherwise provided for in this act, or by the law of any State through which the road may pass, shall be obtained by said Kansas and Neosho Valley Railroad Company, or either of the other companies named in this act, in accordance with the provisions of section three of an act to amend an act entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes," approved July first, eighteen hundred and sixty-two.

Approved, July 25, 1866.

Said Missouri, Kansas and Texas Railway Company further respectfully shows that it is the same corporation mentioned in said section eleven of said act of Congress hereinabove quoted as "Union Pacific Railroad Company, southern branch,' its corporate name having since been changed to "Missouri, Kansas and Texas Railway Company," and that it, in accordance with the provisions of said act of Congress, and said section eleven thereof, obtained the written approval of the President of the United States to construct and operate its line of railroad from the point on the southern boundary of the State of Kansas, indicated in said act, to the point at or near Preston, in the State of Texas, also indicated in said act, and has since the construction of its line of railroad between said points, in accordance with the said approval of the President of the United States, operated its said line of railroad between said points, in accordance with the approval of the President of the United States and said act of Congress hereinabove referred to.

And the said Missouri, Kansas and Texas Railway Company respectfully demands that you do not execute or deliver to any person any deed to or conveyance of, either as an allotment or as a town lot, or on any other account or for any other purpose, any of the sections of land, or any part thereof, hereinabove referred to as being claimed by the said Missouri, Kansas and Texas Railway Company, in accordance with the provisions of said act of Congress approved July twenty-fifth, eighteen hundred and sixty-six, as hereinabove mentioned.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY,

By

JAMES HAGERMAN and
CLIFFORD L. JACKSON,
Its Attorneys.

Muskogee, Indian Territory, August 2d, 1901.

EXHIBIT 30

TO THE HONORABLES

SAMUEL N. JOHNSON,
WESLEY B. BURNEY,

Members of the Townsite Commission for the Chickasaw Nation:

You and each of you are hereby notified that the Missouri, Kansas and Texas Railway Company, a corporation incorporated and organized under and by virtue of the State of Kansas, claims every alternate section of land, or parts thereof, designated by odd numbers to the extent of ten sections per mile on each side of its line of railroad through the Chickasaw Nation, within twenty miles from the line of said road, and that said claim is based upon an Act of Congress entitled, "An Act granting Lands to the State of Kansas to aid in the construction of the Kansas and Neosho Valley Railroad, and its Extension to Red River," approved July 25, 1866, and published in Volume fourteen of the United States Statutes at Large, pages two hundred and thirty-six to two hundred and thirty-nine, inclusive, and sections one, eight, nine and eleven of which said Act are as follows:

"*Be it Enacted by the Senate and House of Representatives of the United States of America in Congress Assembled,*

That for the purpose of aiding the Kansas and Neosho Valley Railroad Company, the same being a corporation organized under the laws of the State of Kansas, to construct and operate a railroad from the eastern terminus of the Union Pacific Railroad, eastern division, at the line between Kansas and Missouri, at or near the mouth of the Kansas River, on the south

side thereof, southwardly, through the eastern tier of counties in Kansas, with a view of its extension, so as to affect a junction at Red River with a railroad now being constructed from Galveston to Red River at or near Preston, in Texas, there is hereby granted to the State of Kansas, for the use and benefit of said railroad company, every alternate section of land or parts thereof, designated by odd numbers, to the extent of ten sections per mile on each side of said road, to be selected within twenty miles *from* (of) the line of said road; but in case it shall appear that the United States has, when the line of said road is definitely located, sold any section, or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United Sates for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid, from the public lands of the United States nearest to the sections above specified, so much land as shall be equal to the amount of such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or preemption has attached as aforesaid, which lands, thus indicated by the direction of the Secretary of the Interior, shall be reserved and held for the State of Kansas for the use of such company by the said Secretary for the purpose of the construction and operation of said railroad, as provided by this act: *Provided*, That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby, reserved and excepted from the operation of this act except so far as it may be found necessary to locate the route of said

road through such reserved lands, in which case the right of way two hundred feet in width is hereby granted, subject to the approval of the President of the United States: *And provided further*, That none of the lands hereby granted shall be selected beyond twenty miles from the said road.

SEC. 8. And be it further enacted, That said Kansas and Neosho Valley Railroad Company, its successors and assigns, is hereby authorized and empowered to extend and construct its railroad from the southern boundary of Kansas south, through the Indian Territory, to Red River, at or near Preston, in the State of Texas, so as to connect with the railway now being constructed from Galveston to a point at or near Preston, in said State; and the right of way through the Indian Territory, wherever such right is now reserved or may hereafter be reserved to the United States by treaty with the Indian tribes, is hereby granted to said company, to the same extent as granted by the sixth section of this act through the public lands; and in all cases where the right of way, as aforesaid, through the Indian lands, shall not be reserved to the government, the said company shall, before constructing its road, procure the consent of the tribe or tribes interested, which consent, with all its terms and conditions, shall be previously approved and indorsed by the President and filed with the Secretary of the Interior.

SEC. 9. And be it further enacted, That the same grants of lands through said Indian Territory are hereby made as provided in the first section of this act, whenever the Indian title shall be extinguished by treaty or otherwise, not to exceed the ratio per mile granted in the first section of this act: *Provided*, That said lands become a part of the public lands of the United States.

SEC. 11. And be it further enacted, That any railroad company chartered under any law of the United States, or of the State of Kansas, which may have been heretofore or shall hereafter be recognized and subsidized by any act of the Congress of the United States, may connect, unite, and consolidate with this railroad company, after the same shall be located to the valley of the Neosho River, upon just, fair, and equitable terms, to be agreed upon between the parties, and shall not be against the public interest or the interest of the United States; nor shall any road authorized to connect as aforesaid charge the road so connecting a greater tariff per mile for freight or passengers than is charged for the same per mile by its own road: *And provided further*, That should the Leavenworth, Lawrence, and Fort Gibson Railroad Company, or the Union Pacific Railroad Company, southern branch, construct and complete its road to that point on the southern boundary of the State of Kansas where the line of said Kansas and Neosho Valley Railroad shall cross the same, before the said Kansas and Neosho Valley Railroad Company shall have constructed and completed its said road to said point, then and in that event the company so first reaching in completion the said point on the southern boundary of the State of Kansas shall be authorized, upon obtaining the written approval of the President of the United States, to construct and operate its line of railroad from said point to a point at or near Preston, in the State of Texas, with grants of land according to the provisions of this act, but upon the further special condition, nevertheless, that said railroad company shall have commenced in good faith the construction thereof before the said Kansas and Neosho Valley Railroad Company shall have completed its said railroad to said point: *And provided further*, That said other railroad company, so having commenced said

work in good faith, shall continue to prosecute the same with sufficient energy to insure the completion of the same within a reasonable time, subject to the approval of the President of the United States: *And provided further*, That the right of way through private property when not otherwise provided for in this act, or by the law of any State through which the road may pass, shall be obtained by said Kansas and Neosho Valley Railroad Company, or either of the other companies named in this act, in accordance with the provisions of section three of an act to amend an act entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes," approved July first, eighteen hundred and sixty-two.

Approved, July 25, 1866.

Said Missouri, Kansas and Texas Railway Company further respectfully shows that it is the same corporation mentioned in said section eleven of said act of Congress hereinabove quoted as "Union Pacific Railroad Company, southern branch,' its corporate name having since been changed to "Missouri, Kansas and Texas Railway Company," and that it, in accordance with the provisions of said act of Congress, and said section eleven thereof, obtained the written approval of the President of the United States to construct and operate its line of railroad from the point on the southern boundary of the State of Kansas, indicated in said act, to the point at or near Preston, in the State of Texas, also indicated in said act, and has since the construction of its line of railroad between said points, in accordance with the said approval of the President of the United States, operated its said line of railroad between said points, in accordance with the approval

of the President of the United States and said act of Congress hereinabove referred to.

And the said Missouri, Kansas and Texas Railway Company respectfully demands that you do not execute or deliver to any person any deed to or conveyance of, either as an allotment or as a town lot, or on any other account or for any other purpose, any of the sections of land, or any part thereof, hereinabove referred to as being claimed by the said Missouri, Kansas and Texas Railway Company, in accordance with the provisions of said act of Congress approved July twenty-fifth, eighteen hundred and sixty-six, as hereinabove mentioned.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY.

By

JAMES HAGERMAN and
CLIFFORD L. JACKSON,
Its Attorneys.

Colbert, Indian Territory, June the sixteenth, 1899.

UNITED STATES OF AMERICA,)
INDIAN TERRITORY,) ss.
CENTRAL JUDICIAL DISTRICT.)

F. E. Guild, being duly sworn, upon his oath states that he served the above and foregoing notice by delivering full, true and correct copies thereof to each Samuel N. Johnson and Wesley B. Burney, members of the Townsite Commission for the Chickasaw Nation, all of which was done at Colbert, I. T., in said above named district and Territory on the sixteenth day of June, A. D. 1899. F. E. GUILD.

Subscribed and sworn to before me this 28th day of June, A. D. 1899.

JAS. O. WINSTON,
Clerk U. S. Court N. D. I. T.
By N. S. YOUNG, Deputy.

EXHIBIT 31

TO THE HONORABLE

ETHAN ALLEN HITCHCOCK,
Secretary of the Interior,
Washington, D. C.

You are hereby notified that the Missouri, Kansas and Texas Railway Company, a corporation incorporated and organized under and by virtue of the laws of the State of Kansas, claims every alternate section of land or parts thereof, designated by odd numbers, to the extent of ten sections per mile on each side of its line of railroad through the Indian Territory, within twenty miles of the line of said road, and said claim is based upon an Act of Congress entitled "An Act granting Lands to the State of Kansas to aid in the Construction of the Kansas and Neosho Valley Railroad and its Extension to Red River," approved July 25, 1866, and published in Volume Fourteen of the United States Statutes at Large, pages two hundred and thirty-six to two hundred and thirty-nine, inclusive, and sections one, eight, nine and eleven of which said Act are as follows:

SECTION 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of aiding the Kansas and Neosho Valley Railroad Company, the same being a corporation organized under the laws of the State of Kansas, to construct and operate a railroad from the eastern terminus of the Union Pacific Railroad, eastern division, at the line between Kansas and Missouri, at or near the mouth of the Kansas River, on the south side thereof, southwardly, through the eastern tier of counties in Kansas, with a view of its extension, so as to effect a junction at Red River with a

railroad now being constructed from Galveston to Red River at or near Preston, in Texas, there is hereby granted to the State of Kansas, for the use and benefit of said railroad company, every alternate section of land or parts thereof, designated by odd numbers, to the extent of ten sections per mile on each side of said road, to be selected within twenty miles *from* (of) the line of said road; but in case it shall appear that the United States have, when the line of said road is definitely located, sold any section, or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid, from the public lands of the United States nearest to the sections above specified, so much land as shall be equal to the amount of such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached as aforesaid, which lands, thus indicated by the direction of the Secretary of the Interior, shall be reserved and held for the State of Kansas for the use of said company by the said Secretary for the purpose of the construction and operation of said railroad, as provided by this act: Provided, That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby, reserved and excepted from the operation of this act, except so far as it may be found necessary to locate the route of said road through such reserved lands, in which case the right of way two hundred feet in width is hereby granted, subject to the approval of the President of the United

States: And provided further, That none of the lands hereby granted shall be selected beyond twenty miles from the said road.

SEC. 8. And be it further enacted, That said Kansas and Neosho Valley Railroad Company, its successors and assigns, is hereby authorized and empowered to extend and construct its railroad from the southern boundary of Kansas south, through the Indian Territory, to Red River, at or near Preston, in the State of Texas, so as to connect with the railway now being constructed from Galveston to a point at or near Preston, in said State; and the right of way through the Indian Territory, wherever such right is now reserved or may hereafter be reserved to the United States by treaty with the Indian tribes, is hereby granted to said company, to the same extent as granted by the sixth section of this act through the public lands; and in all cases where the right of way, as aforesaid, through the Indian lands, shall not be reserved to the government, the said company shall, before constructing its road, procure the consent of the tribe or tribes interested, which consent, with all its terms and conditions, shall be previously approved and indorsed by the President and filed with the Secretary of the Interior.

SEC. 9. And be it further enacted, That the same grants of land through said Indian Territory are hereby made as provided in the first section of this act, whenever the Indian title shall be extinguished by treaty or otherwise, not to exceed the ratio per mile granted in the first section of this act: Provided, That said lands become a part of the public lands of the United States.

SEC. 11. And be it further enacted, That any railroad company chartered under any laws of the United

States, or of the State of Kansas, which may have been heretofore or shall hereafter be recognized and subsidized by any act of the Congress of the United States, may connect, unite, and consolidate with this railroad company, after the same shall be located to the valley of the Neosho River, upon just, fair, and equitable terms, to be agreed upon between the parties, and shall not be against the public interest or the interest of the United States; nor shall any road authorized to connect as aforesaid charge the road so connecting a greater tariff per mile for freight or passengers than is charged for the same per mile by its own road: And provided further, That should the Leavenworth, Lawrence and Fort Gibson Railroad, or the Union Pacific Railroad Company, southern branch, construct and complete its road to that point on the southern boundary of the State of Kansas where the line of said Kansas and Neosho Valley Railroad shall cross the same, before the said Kansas and Neosho Valley Railroad Company shall have constructed and completed its said road to said point, then and in that event the company so first reaching in completion the said point on the southern boundary of the State of Kansas shall be authorized, upon obtaining the written approval of the President of the United States, to construct and operate its line of railroad from said point to a point at or near Preston, in the State of Texas, with grants of land according to the provisions of this act, but upon the further special condition, nevertheless, that said railroad company shall have commenced in good faith the construction thereof before the said Kansas and Neosho Valley Railroad Company shall have completed its said railroad to said point: And provided further, That said other railroad company, so having commenced said work in good faith, shall continue to prosecute the same with sufficient energy to insure the com-

pletion of the same within a reasonable time, subject to the approval of the President of the United States: And provided further, That the right of way through private property when not otherwise provided for in this act, or by the law of any State through which the road may pass, shall be obtained by said Kansas and Neosho Valley Railroad Company, or either of the other companies named in this act, in accordance with the provisions of section three of an act to amend an act entitled "An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes," approved July first, eighteen hundred and sixty-two.

Said Missouri, Kansas and Texas Railway Company further respectfully shows that it is the same corporation mentioned in section eleven of said act of Congress hereinabove quoted as "Union Pacific Railroad Company, southern branch," its corporate name having since been changed to "Missouri, Kansas and Texas Railway Company," and that it, in accordance with the provisions of said Act of Congress, and said section eleven thereof, obtained the written approval of the President of the United States to construct and operate its line of railroad from the point on the southern boundary of the State of Kansas, indicated in said Act, to the point at or near Preston, in the State of Texas, also indicated in said Act, and has, since the construction of its line of railroad between said points, in accordance with the said approval of the President of the United States, operated its said line of railroad between said points, in accordance with said approval of the President of the United States, and said Act of Congress hereinabove referred to.

And said Missouri, Kansas and Texas Railway Company respectfully requests and demands that the sections of land hereinabove referred to as claimed by the said Missouri, Kansas and Texas Railway Company in accordance with the provisions of said Act of Congress, approved July 25, 1866, and hereinabove mentioned, be treated as the lands of the Missouri, Kansas and Texas Railway Company, and that you receive no applications to sell or lease any of said lands so situated within said Indian Territory, and that you do not approve any deeds or leases to any of said lands, and that you take no part whatsover in any transaction looking to the sale or leasing of any of said lands.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY,

By

CLIFFORD L. JACKSON and
JAMES HAGERMAN,
Its Attorneys.

Dated at Muskogee, Ind. Ter., November 13, 1903.

EXHIBIT 32

TO THE HONORABLE

J. BLAIR SHOENFELT,

United States Indian Agent, Union Agency,
Muskogee, Indian Territory.

You are hereby notified that the Missouri, Kansas and Texas Railway Company, a corporation incorporated and organized under and by virtue of the laws of the State of Kansas, claims every alternate section of land or parts thereof, designated by odd numbers, to the extent of ten sections per mile on each side of its line of railroad through the Indian Territory within twenty miles of the line of said road, and said claim is based upon an act of Congress entitled "An Act granting Lands to the State of Kansas to aid in the Construction of the Kansas and Neosho Valley Railroad and its Extension to Red River," approved July 25, 1866, and published in Volume Fourteen of the United States Statutes at Large, pages two hundred and thirty-six to two hundred and thirty-nine, inclusive, and sections one, eight, nine and eleven of which said act are as follows:

SECTION 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of aiding the Kansas and Neosho Valley Railroad Company, the same being a corporation organized under the laws of the State of Kansas, to construct and operate a railroad from the eastern terminus of the Union Pacific Railroad, eastern division, at the line between Kansas and Missouri, at or near the mouth of the Kansas River, on the south side thereof, southwardly, through the eastern tier of counties in Kansas, with a view of its ex-

tension, so as to effect a junction at Red River with a railroad now being constructed from Galveston to Red River at or near Preston, in Texas, there is hereby granted to the State of Kansas, for the use and benefit of said railroad company, every alternate section of land or parts thereof, designated by odd numbers, to the extent of ten sections per mile on each side of said road, to be selected within twenty miles *from* (of) the line of said road; but in case it shall appear that the United States have, when the line of said road is definitely located, sold any section, or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid, from the public lands of the United States nearest to the sections above specified, so much land as shall be equal to the amount of such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached as aforesaid, which lands, thus indicated by the direction of the Secretary of the Interior, shall be reserved and held for the State of Kansas for the use of said company by the said Secretary for the purpose of the construction and operation of said railroad, as provided by this act: Provided, That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or other purpose whatever, be, and the same are hereby, reserved and excepted from the operation of this act, except so far as it may be found necessary to locate the route of said road through such reserved lands, in which case the right of way two hundred feet in width is hereby granted

subject to the approval of the President of the United States: And provided further, That none of the lands hereby granted shall be selected beyond twenty miles from the said road.

SEC. 8. And be it further enacted, That the Kansas and Neosho Valley Railroad Company, its successors and assigns, is hereby authorized and empowered to extend and construct its railroad from the southern boundary of Kansas south, through the Indian Territory, to Red River, at or near Preston, in the State of Texas, so as to connect with the railway now being constructed from Galveston to a point at or near Preston, in said State; and the right of way through the Indian Territory, wherever such right is now reserved or may hereafter be reserved to the United States by treaty with the Indian tribes, is hereby granted to said company, to the same extent as granted by the sixth section of this act through the public lands; and in all cases where the right of way, as aforesaid, through the Indian lands, shall not be reserved to the government, the said company shall, before constructing its road, procure the consent of the tribe or tribes interested, which consent, with all its terms and conditions, shall be previously approved and indorsed by the President and filed with the Secretary of the Interior.

SEC. 9. And be it further enacted, That the same grants of lands through said Indian Territory are hereby made as provided in the first section of this act, whenever the Indian title shall be extinguished by treaty or otherwise, not to exceed the ratio per mile granted in the first section of this act: Provided, That said lands become a part of the public lands of the United States.

SEC. 11. And be it further enacted, That any railroad company chartered under any law of the United

States, or of the State of Kansas, which may have been heretofore or shall hereafter be recognized and subsidized by any act of the Congress of the United States, may connect, unite, and consolidate with this railroad company, after the same shall be located to the valley of the Neosho River, upon just, fair, and equitable terms, to be agreed upon between the parties, and shall not be against the public interest or the interest of the United States; nor shall any road authorized to connect as aforesaid charge the road so connecting a greater tariff per mile for freight or passengers than is charged for the same per mile by its own road: And provided further, That should the Leavenworth, Lawrence and Fort Gibson Railroad Company, or the Union Pacific Railroad Company, southern branch, construct and complete its road to that point on the southern boundary of the State of Kansas where the line of said Kansas and Neosho Valley Railroad shall cross the same, before the said Kansas and Neosho Valley Railroad Company shall have constructed and completed its said road to said point, then and in that event the company so first reaching in completion the said point on the southern boundary of the State of Kansas shall be authorized, upon obtaining the written approval of the President of the United States, to construct and operate its line of railroad from said point to a point at or near Preston, in the State of Texas, with grants of land according to the provisions of this act, but upon the further special condition, nevertheless, that said railroad company shall have commenced in good faith the construction thereof before the said Kansas and Neosho Valley Railroad Company shall have completed its said railroad to said point: And provided further, That said other railroad company, so having commenced said work in good faith, shall continue to prosecute the same with sufficient energy to insure the completion of

the same within a reasonable time, subject to the approval of the President of the United States: And provided further, That the right of way through private property when not otherwise provided for in this act, or by the law of any State through which the road may pass, shall be obtained by said Kansas and Neosho Valley Railroad Company, or either of the other companies named in this act, in accordance with the provisions of section three of an act to amend an act entitled "An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes, approved July first, eighteen hundred and sixty-two.

Said Missouri, Kansas and Texas Railway Company further respectfully shows that it is the same corporation mentioned in section eleven of said act of Congress hereinabove quoted as "Union Pacific Railroad Company, southern branch," its corporate name having since been changed to "Missouri, Kansas and Texas Railway Company," and that it, in accordance with the provisions of said act of congress, and said section eleven thereof, obtained the written approval of the President of the United States to construct and operate its line of railroad from the point on the southern boundary of the State of Kansas, indicated in said Act, to the point at or near Preston, in the State of Texas, also indicated in said Act, and has, since the construction of its line of railroad between said points, in accordance with the said approval of the President of the United States, operated its said line of railroad between said points, in accordance with said approval of the President of the United States, and said Act of Congress hereinabove referred to.

And said Missouri, Kansas and Texas Railway Company respectfully requests and demands that the sections of land hereinabove referred to as claimed by the said Missouri, Kansas and Texas Railway Company, in accordance with the provisions of said Act of Congress, approved July 25, 1866, and hereinabove mentioned, be treated as the lands of the Missouri, Kansas and Texas Railway Company, and that you do not list or advertise any of said lands for sale or lease, and that you do not receive any bid or bids for any of said lands, and that you do not permit any deeds or leases to any of said lands to be executed or acknowledged before you, and that you do not transmit any deeds or leases to any of said lands to the Secretary of the Interior or to any other official, and that you do not deliver any deeds or leases to any of said lands to any grantee or other person, and that you take no part whatsoever in any transaction looking to the sale or leasing of any of said lands.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY,

By

CLIFFORD L. JACKSON and
JAMES HAGERMAN,
Its Attorneys.

Dated at Muskogee, Ind. Ter., November 13, 1903.

UNITED STATES OF AMERICA,)
INDIAN TERRITORY,)ss.
WESTERN JUDICIAL DISTRICT,)

William L. Martin, of lawful age, being first duly sworn, upon oath states that he served the within and foregoing notice by delivering a full, true and correct copy of the same to the Honorable J. Blair Shoenfelt, United States Indian Agent, Union Agency, Muskogee, Indian Territory, at the hour of 4:40 o'clock p. m. on the 13th day of November, 1903, all of which was done in the town of Muskogee, Western Judicial District of the Indian Territory.

WILLIAM L. MARTIN.

Subscribed and sworn to before me, the undersigned, a Notary Public within and for the Western Judicial District of the Indian Territory, on this 13th day of November, 1903.

ERNEST BROWN, Notary Public.

EXHIBIT 33

TO THE HONORABLES

J. GEORGE WRIGHT,

United States Indian Inspector for the Indian Territory;

H. V. HINCKLEY,

Supervising Engineer of Townsites in the Indian Territory:

You and each of you are hereby notified that the Missouri, Kansas and Texas Railway Company, a corporation incorporated and organized under and by virtue of the laws of the State of Kansas, claims every alternate section of land, or parts thereof, designated by odd numbers to the extent of ten sections per mile on each side of its line of railroad through the Indian Territory, within twenty miles from the line of said road, and that said claim is based upon an Act of Congress entitled, "An Act granting Lands to the State of Kansas to aid in the Construction of the Kansas and Neosho Valley Railroad and its Extension to Red River," approved July 25, 1866, and published in Volume 14 of the United States Statutes at Large, pages two hundred and thirty-six to two hundred and thirty-nine, inclusive, and sections one, eight, nine and eleven of which said act are as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That for the purpose of aiding the Kansas and Neosho Valley Railroad Company, the same being a corporation organized under the laws of the State of Kansas, to construct and operate a railroad from the eastern terminus of the Union Pacific Railroad,

eastern division, at the line between Kansas and Missouri, at or near the mouth of the Kansas River, on the south side thereof, southwardly, through the eastern tier of counties in Kansas, with a view of its extension, so as to effect a junction at Red River with a railroad now being constructed from Galveston to Red River, at or near Preston, in Texas, there is hereby granted to the State of Kansas for the use and benefit of said railroad company every alternate section of land or parts thereof designated by odd numbers to the extent of ten sections per mile on each side of said road, to be selected within twenty miles *from* (of) the line of said road; but in case it shall appear that the United States have, when the line of said road is definitely located, sold any section, or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid, from the public lands of the United States nearest to the sections above specified, so much land as shall be equal to the amount of such lands as the United States have sold, reserved or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached as aforesaid, which lands, thus indicated by the direction of the Secretary of the Interior, shall be reserved and held for the State of Kansas for the use of said company by the said Secretary for the purpose of the construction and operation of said railroad, as provided by this act: Provided, That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby,

reserved and excepted from the operation of this act, except so far as it may be found necessary to locate the route of said road through such reserved lands, in which case the right of way two hundred feet in width is hereby granted, subject to the approval of the President of the United States: And provided further, That none of the land hereby granted shall be selected beyond twenty miles from the said road.

SEC. 8. And be it further enacted, That said Kansas and Neosho Valley Railroad Company, its successors and assigns, is hereby authorized and empowered to extend and construct its railroad from the southern boundary of Kansas south, through the Indian Territory, to Red River, at or near Preston, in the State of Texas, so as to connect with the railway now being constructed from Galveston to a point at or near Preston, in said State; and the right of way through the Indian Territory, wherever such right is now reserved or may hereafter be reserved to the United States by treaty with the Indian tribes, is hereby granted to said company, to the same extent as granted by the sixth section of this act through the public lands; and in all cases where the right of way, as aforesaid, through the Indian lands, shall not be reserved to the government, the said company shall, before constructing its road, procure the consent of the tribe or tribes interested, which consent, with all its terms and conditions, shall be previously approved and indorsed by the President and filed with the Secretary of the Interior.

SEC. 9. And be it further enacted, That the same grants of lands through said Indian Territory are hereby made as provided in the first section of this act, whenever the Indian title shall be extinguished by treaty or otherwise, not to exceed the ratio per mile granted in the first section of this act: Provided, That

said lands become a part of the public lands of the United States.

SEC. 11. And be it further enacted, That any railroad company chartered under any law of the United States, or of the State of Kansas, which may have been heretofore or shall hereafter be recognized and subsidized by any act of the Congress of the United States, may connect, unite, and consolidate with this railroad company, after the same shall be located to the valley of the Neosho River, upon just, fair and equitable terms, to be agreed upon between the parties, and shall not be against the public interests or the interests of the United States; nor shall any road authorized to connect as aforesaid charge the road so connecting a greater tariff per mile for freight or passengers than is charged for the same per mile by its own road: And provided further, That should the Leavenworth, Lawrence and Fort Gibson Railroad Company, or the Union Pacific Railroad Company, southern branch, construct and complete its road to that point on the southern boundary of the State of Kansas where the line of said Kansas and Neosho Valley Railroad shall cross the same, before the said Kansas and Neosho Valley Railroad Company shall have constructed and completed its said road to said point, then and in that event the company so first reaching in completion the said point on the southern boundary of the State of Kansas shall be authorized, upon obtaining the written approval of the President of the United States, to construct and operate its line of railroad from said point to a point at or near Preston, in the state of Texas, with grants of land according to the provisions of this act, but upon the further special condition, nevertheless, that said railroad company shall have commenced in good faith the construction thereof before the said Kansas and

Neosho Valley Railroad Company shall have completed its said railroad to said point: And provided further, That said other railroad company, so having commenced said work in good faith, continue to prosecute the same with sufficient energy to insure the completion of the same within a reasonable time, subject to the approval of the President of the United States: And provided further, That the right of way through private property when not otherwise provided for in this act, or by the law of any State through which the road may pass, shall be obtained by said Kansas and Neosho Valley Railroad Company, or either of the other companies named in this act, in accordance with the provisions of section three of an act to amend an act entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes," approved July first, eighteen hundred and sixty-two.

Approved July 25, 1866.

Said Missouri, Kansas and Texas Railway Company further respectfully shows that it is the same corporation mentioned in section eleven of said act of Congress hereinabove quoted as "Union Pacific Railway Company, southern branch," its corporate name having since been changed to the "Missouri, Kansas and Texas Railway Company," and that it, in accordance with the provisions of said act of Congress, and said section eleven thereof, obtained the written approval of the President of the United States to construct and operate its line of railroad from the point on the southern boundary of the State of Kansas, indicated in said act, to the point at or near Preston, in the State of Texas, also indicated in said act, and has since the construction of its line of railroad between said points, in ac-

cordance with the said approval of the President of the United States, operated its said line of railroad between said points, in accordance with the approval of the President of the United States and the said act of Congress hereinabove referred to.

And the said Missouri, Kansas and Texas Railway Company respectfully demands that you do not cause to be surveyed, laid out or platted in the Indian Territory for any townsite or townsites, or any part or parts thereof, any of the sections of land, or any parts thereof, hereinabove referred to as being claimed by the said Missouri, Kansas and Texas Railway Company in accordance with the provisions of said Act of Congress, approved July twenty-fifth, eighteen hundred and sixty-six, and hereinabove mentioned.

MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY.

By

JAMES HAGERMAN and
CLIFFORD L. JACKSON,
Its Attorneys.

Muskogee, Indian Territory, July 29th, 1901.

UNITED STATES OF AMERICA,)
INDIAN TERRITORY,) ss.
NORTHERN JUDICIAL DISTRICT,)

I, Leo E. Bennett, United States Marshal for the Northern Judicial District of the Indian Territory, do hereby certify that I served the above and foregoing notice by delivering a true and correct copy of said notice to J. George Wright, U. S. Indian Inspector for the Indian Territory, on the ..... day of ....., 1901, and by delivering a true and correct copy of said notice to H. V. Hinckley, Supervising Engineer of Townsites in the Indian Territory, on the 29th day of July, 1901, all of which was done in the town of Muskogee, and said Northern Judicial District, of the Indian Territory.

In Witness Whereof, I have hereunto set my hand as Marshal of said Northern Judicial District of the Indian Territory, on this the ..... day of ....., 1901.

LEO E. BENNETT,
United States Marshal.

.. By....., Deputy.

Served by copy personally on J. George Wright, U. S. Indian Inspector for the Indian Territory, at Muskogee, Indian Territory, Aug. 12, 1901.

LEO E. BENNETT, U. S. Marshal.
DAVID ADAMS, Deputy.

LANDS RESERVED FROM ALLOTMENT IN THE CHEROKEE NATION.

The following lands shall be reserved from the allotment of lands herein provided for:

(a) All lands set apart for townsites by the provision of the act of Congress of June twenty-eighth, eighteen hundred and ninety-eight (Thirtieth Statutes, page four hundred and ninety-five), the provisions of the act of Congress of May thirty-first, nineteen hundred (Thirty-first Statutes, page two hundred and twenty-one), and by provisions of this act.

(b) All lands to which, upon the date of the ratification of this act, any railroad company may, under any treaty or act of Congress, have a vested right for right of way, depots, station grounds, water stations, stock yards, or similar uses only, connected with the maintenance and operation of the railroad.

(c) All lands selected for town cemeteries not to exceed twenty acres each.

(d) One acre of land for each Cherokee schoolhouse not included in town sites or herein otherwise provided for.

(e) Four acres for Willie Halsell College at Vinita.

(f) Four acres for Baptist Mission school at Tahlequah.

(g) Four acres for Presbyterian school at Tahlequah.

(h) Four acres for Park Hill Mission school south of Tahlequah.

(i) Four acres for Elm Spring Mission school at Barren Fork.

(j) Four acres for Dwight Mission school at Salisaw.

(k) Four acres for Skiatook Mission near Skiatook.

(l) Four acres for Lutheran Mission school on Illinois River north of Tahlequah.

(m) Sufficient ground for burial purposes where neighborhood cemeteries are now located, not to exceed three acres each.

(n) One acre for each church house outside of towns.

(o) The square now occupied by the capitol building at Tahlequah.

(p) The grounds now occupied by the national jail at Tahlequah.

(q) The grounds now occupied by the Cherokee Advocate printing office at Tahlequah.

(r) Forty acres for the Cherokee Male Seminary near Tahlequah.

(s) Forty acres for the Cherokee Female Seminary at Tahlequah.

(t) One hundred and twenty acres for the Cherokee Orphan Asylum on Grand River.

(u) Forty acres for colored high school in Tahlequah district.

(v) Forty acres for the Cherokee Insane Aslyum.

(w) Four acres for the school for blind, deaf, and dumb children near Fort Gibson.

The acre so reserved for any church or schoolhouse in any quarter section of land shall be located where prac-

ticable in a corner of such quarter section adjacent to the section lines thereof.

Provided, That the Methodist Episcopal Church South may, within twelve months after the ratification of this act, pay ten dollars per acre for the one hundred and sixty acres of land adjacent to the town of Vinita, and heretofore set apart by act of the Cherokee national council for the use of said church for missionary and educational purposes, and now occupied by Willie Halsell College (formerly Galloway College), and shall thereupon receive title thereto; but if said church fail to do so it may continue to occupy said one hundred and sixty acres of land as long as it uses same for the purposes aforesaid.

Any other school or college in the Cherokee Nation which claims to be entitled under the law to a greater number of acres than is set apart for said school or college by section 24 of this act may have the number of acres to which it is entitled by law. The trustees of such school or college shall, within sixty days after the ratification of this act, make application to the Secretary of the Interior for the number of acres to which such school or college claims to be entitled, and if the Secretary of the Interior shall find that such school or college is, under the laws and treaties of the Cherokee Nation in force prior to the ratification of this act, entitled to a greater number of acres of land than is provided for in this act, he shall so determine and his decision shall be final. The amount so found by the Secretary of the Interior shall be set apart for the use of such college or school as long as the same may be used for missionary and educational purposes: Provided, That the trustees of such school or college shall pay ten dollars per acre for the number of acres so found by the Secreary of the Interior and which have

been heretofore set apart by act of the Cherokee national council for use of such school or college for missionary or educational purposes, and upon the payment of such sum within sixty days after the decision of the Secretary of the Interior, said college or school may receive a title to such land.

(Sec. 24 of an act entitled "An Act to provide for the allotment of the lands of the Cherokee Nation, for the disposition of townsites therein, and for other purposes," 32 Stat. L. 716.)

LANDS RESERVED FROM ALLOTMENT IN THE CREEK NATION.

"The following lands shall be reserved from the general allotment herein provided for:

(a) All lands herein set apart for town sites.

(b) All lands to which, at the date of the ratification of this agreement, any railroad company may, under any treaty or act of Congress, have a vested right for right of way, depots, station grounds, water stations, stock yards or similar uses connected with the maintenance and operation of the railroad.

(c) Forty acres for the Eufaula High School.

(d) Forty acres for the Wealaka Boarding School.

(e) Forty acres for the Newyaka Boarding School.

(f) Forty acres for the Wetumka Boarding School.

(g) Forty acres for the Euchee Boarding School.

(h) Forty acres for the Coweta Boarding School.

(i) Forty acres for the Creek Orphan Home.

(j) Forty acres for the Tallahassee Colored Boarding School.

(k) Forty acres for the Pecan Creek Colored Boarding School.

(l) Forty acres for the Colored Creek Orphan Home.

(m) All lands selected for town cemeteries, as herein provided.

(n) The lands occupied by the university established by the American Baptist Home Mission Society, and located near the town of Muskogee, to the amount of forty acres, which shall be appraised, excluding improvements thereon, and said university shall have the right to purchase the same by paying one-half the ap-

praised value thereof, on terms and conditions herein provided. All improvements made by said university on lands in excess of said forty acres shall be appraised and the value thereof paid to it by the person to whom such lands may be allotted.

(o) One acre each for the six established Creek court-houses with the improvements thereon.

(p) One acre each for all churches and schools outside of towns now regularly used as such.

All reservations under the provisions of this agreement, except as otherwise provided herein, when not needed for the purposes for which they are at present used, shall be sold at public auction to the highest bidder, to citizens only, under directions of the Secretary of the Interior."

(Sec. 24 of the Act entitled "An Act to ratify and confirm an agreement with the Muscogee or Creek tribe of Indians, and for other purposes." 31 Stat. L., 861.)

"Public highways or roads 3 rods in width, being one and one-half rods on each side of the section line, may be established along all section lines without any compensation being paid therefor; and all allottees, purchasers, and others shall take the title to such lands subject to this provision. And public highways or roads may be established elsewhere whenever necessary for the public good, the actual value of the land taken elsewhere than along section lines to be determined under the direction of the Secretary of the Interior while the tribal government continues, and to be paid by the Creek Nation during that time; and if buildings or other improvements are damaged in consequence of the establishment of such public highways or

roads, whether along section lines or elsewhere, such damages, during the continuance of the tribal government, shall be determined and paid in the same manner.

In all instances of the establishment of town sites in accordance with the provisions of the act of Congress approved May 31, 1900 (31 Stat. L. 231), or those of section 10 of the agreement ratified by act of Congress approved March 1, 1901 (31 Stat. L., 861), authorizing the Secretary of the Interior, upon the recommendation of the Commission to the Five Civilized Tribes, at any time before allotment, to set aside and reserve from allotment any lands in the Creek Nation, not exceeding 160 acres in any one tract, at such stations as are or shall be established in conformity with law on the line of any railroad which shall be constructed, or be in process of construction, in or through said nation prior to the allotment of lands therein, any citizen who shall have previously selected such town site, or any portion thereof, for his allotment, or who shall have been by reason of improvements therein entitled to select the same for his allotment, shall be paid by the Creek Nation the full value of his improvements thereon at the time of the establishment of the townsite, under rules and regulations to be prescribed by the Secretary of the Interior: *Provided, however*, That such citizens may purchase any of said lands in accordance with the provisions of the act of March 1, 1901 (31 Stat. L., 61): *And provided further*, That the lands which may hereafter be set aside and reserved for town sites upon recommendation of the Dawes Commission as herein provided shall embrace such acreage as may be necessary for the present needs and reasonable prospective growth of such town sites, and not to exceed 640 acres for each town site, and 10 per cent of the net proceeds arising from the sale of that portion of the land within the town site so selected by him, or which he was so entitled to

select; and this shall be in addition to his right to receive from other lands an allotment of 160 acres."

(**Secs. 10 and 11, of the Act entitled** "An Act to ratify and confirm a supplemental agreement with the Creek tribe of Indians, and for other purposes." (32 Stat. L., 500).

"A cemetery other than a town cemetery included within the boundaries of an allotment shall not be desecrated by tillage or otherwise, but no interment shall be made therein except with the consent of the allottee, and any person desecrating by tillage or otherwise a grave or graves in a cemetery included within the boundaries of an allotment shall be guilty of a misdemeanor and upon conviction be punished as provided in section 567 of Mansfield's Digest of the Statutes of Arkansas.

Whenever the town-site surveyors of any town in the Creek Nation shall have selected and located a cemetery as provided in section 18 of the act of Congress approved March 1, 1901 (31 Stat. L., 861), the town authorities shall not be authorized to dispose of lots in such cemetery until payment shall have been made to the Creek Nation for land used for said cemetery as provided in said act of Congress; and if the town authorities fail or refuse to make payment as aforesaid within one year of the approval of the plat of said cemetery by the Secretary of the Interior, the land so reserved shall revert to the Creek Nation and be subject to allotment. And for lands heretofore or hereafter designated as parks upon any plat or any town site, the town shall make payment into the Treasury of the United States to the credit of the Creek Nation within one year at the rate of $20 per acre; and if such payment be not made within that time, the lands

so designated as a park shall be platted into lots and sold as other town lots."

(Secs. 12 and 13, of the Act entitled "An Act to ratify and confirm a supplemental agreement with the Creek tribe of Indians, and for other purposes." 32 Stat. L., 500).

LANDS RESERVED FROM ALLOTMENT IN THE CHOCTAW AND CHICKASAW NATIONS.

"The following lands shall be reserved from the allotment of lands herein provided for:

(a) All lands set apart for town sites either by the terms of the Atoka agreement, the act of Congress of May 31, 1900 (31 Stats., 221), as herein assented to, or by the terms of this agreement.

(b) All lands to which, at the date of the final ratification of this agreement, any railroad company may under any treaty or act of Congress have a vested right for right of way, depots, station grounds, water stations, stock yards, or similar uses connected with the maintenance and operation of the railroad.

(c) The strip of land lying between the city of Fort Smith, Arkansas, and the Arkansas and Poteau rivers, extending up the said Poteau River to the mouth of Mill Creek.

(d) All lands which shall be segregated and reserved by the Secretary of the Interior on account of their coal or asphalt deposits, as hereinafter provided. And the lands selected by the Secretary of the Interior at and in the vicinity of Sulphur, in the Chickasaw Nation, under the cession to the United States hereunder made by said tribes.

(e) One hundred and sixty acres for Jones' Academy.

(f) One hundred and sixty acres for Tuskahoma Female Seminary.

(g) One hundred and sixty acres for Wheelock Orphan Seminary.

(h) One hundred and sixty acres for Armstrong Orphan Academy.

(i) Five acres for capitol building of the Choctaw Nation.

(j) One hundred and sixty acres for Bloomfield Academy.

(k) One hundred and sixty acres for Lebanon Orphan Home.

(l) One hundred and sixty acres for Harley Institute.

(m) One hundred and sixty acres for Rock Academy.

(n) One hundred and sixty acres for Collins Institute.

(o) Five acres for the capitol building of the Chickasaw Nation.

(p) Eighty acres for J. S. Murrow.

(q) Eighty acres for H. R. Schermerhorn.

(r) Eighty acres for the widow of R. S. Bell.

(s) A reasonable amount of land, to be determined by the town-site commissioners, to include all tribal court-houses and jails and other tribal public buildings.

(t) Five acres for any cemetery located by the town-site commissioners prior to the date of the final ratification of this agreement.

(u) One acre for any church under the control of and used exclusively by the Choctaw or Chickasaw citizens at the date of the final ratification of this agreement.

(v) One acre each for all Choctaw or Chickasaw schools under the supervision of the authorities of the Choctaw or Chickasaw nations and officials of the United States.

And the acre so reserved for any church or school in any quarter section of land shall be located when practicable in a corner of such quarter section lying adjacent to the section line thereof."

(Sec. 26 of the Act entitled "An Act to ratify and confirm an agreement with the Choctaw and Chickasaw tribes of Indians, and for other purposes." 32 Stat. L., 641).

"That there shall be reserved from allotment one acre of the unallotted lands of the Choctaw and Chickasaw tribes for each church under the control of or used exclusively by the Choctaw or Chickasaw freedmen; and there shall be reserved from allotment one acre of said lands for each school conducted by Choctaw or Chickasaw freedmen, under the supervision of the authorities of said tribes and officials of the United States, and patents shall issue, as provided by law, to the person or organization entitled to receive the same. There are also reserved such tracts from said lands as the Secretary of the Interior may approve for cemeteries; and such cemeteries may be reserved, respectively, for Indians, freedmen, and whites, as the Secretary may designate.

That the Secretary of the Interior is hereby authorized and empowered to segregate and reserve from allotment, and to cancel any filings or applications that may heretofore have been made with a view to allotting, the following-described lands, situate in the Choctaw Nation, Indian Territory, to-wit: The northwest quarter of section twelve, in township five north, range fifteen east, containing in the aggregate one hundred and sixty acres more or less. That the provisions of sections fifty-six to sixty-three, inclusive, of the Act of Congress approved July first, nineteen hundred and two, entitled

"An Act to ratify and confirm an agreement with the Choctaw and Chickasaw tribes, and for other purposes," be, and the same are hereby, made applicable to the lands above described, the same as if the said described lands had been made a part of the segregation as contemplated by said sections fifty-six to sixty-three, inclusive, of said above Act approved July first, nineteen hundred and two: *Provided*, That the Secretary of the Interior may, in his discretion, add to and make a part of the coal mining leases now in effect, and to which said lands are contiguous, the northwest quarter of section twelve, in township five north, of range fifteen east, government subdivisions being followed as nearly as possible: *Provided further*, That the holder or holders of the lease or leases to which such lands shall be added shall, before the same are added, pay the Indian or Indians who have filed upon or applied for such lands as their allotments, or who are in possession thereof, the value of the improvements placed on the land by said Indian or Indians, such value to be determined under the direction of the Secretary of the Interior."

(An act making appropriations for the current and contingent expenses of the Indian Department, for fulfilling treaty stipulations with various Indian tribes, and for other purposes, for the fiscal year ending June thirtieth, nineteen hundred and seven." Statutes of U. S., 1st Session Fifty-Ninth Congress, 1905-1906, p. 325.)

EXHIBIT 34

ACT OF CONGRESS PROVIDING FOR FINAL DISPOSITION OF THE AFFAIRS OF THE FIVE CIVILIZED TRIBES.

"That the lands in the Choctaw, Chickasaw, Cherokee, Creek, and Seminole nations reserved from allotment or sale under any Act of Congress for the use or benefit of any person, corporation, or organization shall be conveyed to the person, corporation, or organization entitled thereto: *Provided*, That if any tract or parcel thus reserved shall before conveyance thereof be abandoned for the use for which it was reserved by the party in whose interest the reservation was made, such tract or parcel shall revert to the tribe and be disposed of as other surplus lands thereof: *Provided further*, That this section shall not apply to land reserved from allotment because of the right of any railroad or railway company therein in the nature of an easement for right of way, depot, station grounds, water stations, stock yards, or other uses connected with the maintenance and operation of such company's railroad, title to which tracts may be acquired by the railroad or railway company under rules and regulations to be prescribed by the Secretary of the Interior at a valuation to be determined by him; but if any such company shall fail to make payment within the time prescribed by the regulations or shall cease to use such land for the purpose for which it was reserved, title thereto shall thereupon vest in the owner of the legal subdivision of which the land so abandoned is a part, except lands within a municipality, the title of which, upon abandonment, shall vest in such municipality.

The principal chief of the Choctaw Nation and the governor of the Chickasaw Nation are, with the approval of the Secretary of the Interior, hereby authorized and directed to issue patents to the Murrow Indian

Orphans' Home, a corporation of Atoka, Indian Territory, in all cases where tracts have been allotted under the direction of the Secretary of the Interior for the purpose of allowing the allottees to donate the tract so allotted to said Murrow Orphans' Home.

In all cases where enrolled citizens of either Choctaw or Chickasaw tribe have taken their homestead and surplus allotment and have remaining over an unallotted right to less than ten dollars on the basis of the allotment value of said lands, such unallotted right may be conveyed by the owners thereof to the Murrow Indian Orphans' Home aforesaid; and whenever said conveyed rights shall amount in the aggregate to as much as ten acres of average allotable land, land to represent the same shall be allotted to the said Murrow Indian Orphans' Home, and certificate and patent shall issue therefor to said Murrow Indian Orphans' Home.

And there is hereby authorized to be conveyed to said Murrow Indian Orphans' Home, in the manner hereinbefore prescribed for the conveyance of land, the following-described lands in the Choctaw and Chickasaw nations, to-wit: Sections eighteen and nineteen in township two north, range twelve east; the south half of the northeast quarter, the northeast quarter of the northeast quarter; the south half of the northwest quarter of the northeast quarter, the south half of the southeast quarter, the northeast quarter of the southeast quarter, the south half of the northwest quarter of the southeast quarter, the northeast quarter of the northwest quarter of the southeast quarter, the northeast quarter of the southeast quarter of the southwest quarter, and the northwest quarter of the northwest quarter of section twenty-four, and the northwest quarter of the southeast quarter, the north half of the southwest quarter of the southeast quarter, the south half of the southwest quarter of the southwest quarter, the northeast

quarter of the southwest quarter of the southwest quarter, and the southeast quarter of the northwest quarter of the southwest quarter of section twenty-three, and the southwest quarter of the southwest quarter of the southeast quarter of section twenty-six, and the southeast quarter of the northwest quarter of the northwest quarter, the south half of the northeast quarter of the northwest quarter, the northeast quarter of the northeast quarter of the northwest quarter, and the east half of the southeast quarter of the northwest quarter of section twenty-five, all in township two north, range eleven east, containing one thousand seven hundred and ninety acres, as shown by the government survey, for the purpose of said Home."

"The Secretary of the Interior shall take possession of all buildings now or heretofore used for governmental, school, and other tribal purposes, together with the furniture therein and the land appertaining thereto, and appraise and sell the same at such time and under such rules and regulations as he may prescribe, and deposit the proceeds, less expenses incident to the appraisement and sale, in the Treasury of the United States to the credit of the respective tribes: *Provided*, That in the event said lands are embraced within the geographical limits of a State or Territory of the United States such State or Territory or any county or municipality therein shall be allowed one year from date of establishment of said State or Territory within which to purchase any such lands and improvements within their respective limits at not less than the appraised value. Conveyances of lands disposed of under this section shall be executed, recorded, and delivered in like manner and with like effect as herein provided for other conveyances."

"That when allotments as provided by this and other Acts of Congress have been made to all members and

freedmen of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes, the residue of lands in each of said nations not reserved or otherwise disposed of shall be sold by the Secretary of the Interior under rules and regulations to be prescribed by him and the proceeds of such sales deposited in the United States Treasury to the credit of the respective tribes. In the disposition of the unallotted lands of the Choctaw and Chickasaw nations each Choctaw and Chickasaw freedman shall be entitled to a preference right, under such rules and regulations as the Secretary of the Interior may prescribe, to purchase at the appraised value enough land to equal with that already allotted to him forty acres in area. If any such purchaser fails to make payment within the time prescribed by said rules and regulations, then such tract or parcel of land shall revert to the said Indian Tribes and be sold as other surplus lands thereof. The Secretary of the Interior is hereby authorized to sell, whenever in his judgment it may be desirable, any of the unallotted land in the Choctaw and Chickasaw nations, which is not principally valuable for mining, agricultural, or timber purposes, in tracts of not exceeding six hundred and forty acres to any one person, for a fair and reasonable price, not less than the present appraised value. Conveyances of lands sold under the provisions of this section shall be executed, recorded, and delivered in like manner and with like effect as herein provided for other conveyances: *Provided further*, That agricultural lands shall be sold in tracts of not exceeding one hundred and sixty acres to any one person."

(Secs. 14, 15 and 16 of an act entitled "An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes," approved April 26, 1906.)

PROVISIONS OF STATUTES OF THE UNITED STATES AND AGREEMENTS WITH THE FIVE DIFFERENT CIVILIZED TRIBES COVERING TOWNSITES, AND DESCRIPTIONS OF ALL TOWNSITES LAID OUT WITHIN TWENTY MILES OF THE MISSOURI, KANSAS AND TEXAS RAILWAY.

Section 2380 Revised Statutes of the United States, Second Edition (1878) page 436, reads as follows:

"The President is authorized to reserve from the public lands, whether surveyed or unsurveyed, town sites on the shores of harbors, at the junction of rivers, important portages, or any natural or prospective centers of population."

Section 2381, same Volume, reads as follows:

"When, in the opinion of the President, the public interests require it, it shall be the duty of the Secretary of the Interior to cause any of such reservations, or part thereof, to be surveyed into urban or suburban lots of suitable size, and to fix by appraisement of disinterested persons their cash value, and to offer the same for sale at public outcry to the highest bidder, and thence afterward to be held subject to sale at private entry according to such regulations as the Secretary of the Interior may prescribe; but no lot shall be disposed of at public sale or private entry for less than the appraised value thereof. And all such sales shall be conducted by the register and receiver of the land office in the district in which the reservations may be situated, in accordance with the instructions of the Commissioner of the General Land-Office."

Section 2382, same Volume, reads as follows:

In any case in which parties have already founded, or may hereafter desire to found, a city or town on the

pubic lands, it may be lawful for them to cause to be filed with the recorder for the county in which the same is situated, a plat thereof, for not exceeding six hundred and forty acres, describing its exterior boundaries according to the lines of the public surveys, where such surveys have been executed; also giving the name of such city or town, and exhibiting the streets, squares, blocks, lots., and alleys, the size of the same, with measurements and area of each municipal subdivision, the lots in which shall each not exceed four thousand two hundred square feet, with a statement of the extent and general character of the improvements; such map and statement to be verified under oath by the party acting for and in behalf of the persons proposing to establish such city or town; and within one month after such filing there shall be transmitted to the General Land-Office a verified transcript of such map and statement, accompanied by the testimony of two witnesses that such city or town has been established in good faith, and when the premises are within the limits of an organized land district, a similar map and statement shall be filed with the register and receiver, and at any time after the filing of such map, statement, and testimony in the General Land Office it may be lawful for the President to cause the lots embraced within the limits of such city or town to be offered at public sale to the highest bidder, subject to a minimum of ten dollars for each lot; and such lots as may not be disposed of at public sale shall thereafter be liable to private entry at such minimum, or at such reasonable increase or diminuation thereafter as the Secretary of the Interior may order from time to time, after at least three months' notice, in view of the increase or decrease in the value of the municipal property. But any actual settler upon any lot, as above provided, and upon any additional lot in which he may have substantial improvements shall

be entitled to prove up and purchase the same as a pre-emption, at such minimum, at any time before the day fixed for the public sale.

Section 2387, same Volume, reads as follows:

"Whenever any portion of the public lands have been or may be settled upon and occupied as a town-site, not subject to entry under the agricultural pre-emption laws, it is lawful, in case such town be incorporated, for the corporate authorities thereof, and, if not incorporated, for the judge of the county court for the county in which such town is situated, to enter at the proper land-office, and at the minimum price, the land so settled and occupied in trust for the several use and benefit of the occupants thereof, according to their respective interests; the execution of which trust, as to the disposal of the lots in such town, and the proceeds of the sales thereof, to be conducted under such regulations as may be prescribed by the legislative authority of the State or Territory in which the same may be situated."

Section 2388, same Volume, reads as follows:

"The entry of the land provided for in the preceding section shall be made, or a declaratory statement of the purpose of the inhabitants to enter it as a town-site shall be filed with the register of the proper land-office, prior to the commencement of the public sale of the body of land in which it is included, and the entry or declaratory statement shall include only such land as is actually occupied by the town, and the title to which is in the United States; but in any Territory in which a land-office may not have been established, such declaratory statements may be filed with the surveyor-general of the surveying district in which the lands are situated, who shall transmit the same to the General Land-Office."

Section 2389, same Volume, reads as follows:

"If upon surveyed lands, the entry shall in its exterior limit be made in conformity to the legal subdivisions of the public lands authorized by law; and where the inhabitants are in number one hundred, and less than two hundred, shall embrace not exceeding three hundred and twenty acres; and in cases where the inhabitants of such town are more than two hundred, and less than one thousand, shall embrace not exceeding six hundred and forty acres; and where the number of inhabitants is one thousand and over one thousand, shall embrace not exceeding twelve hundred and eighty acres; but for each additional one thousand inhabitants, not exceeding five thousand in all, a further grant of three hundred and twenty acres shall be allowed."

Section 15 of the Act of Congress entitled "An Act for the Protection of the People of the Indian Territory, and for other purposes," commonly known as the "Curtis Act," passed and approved June 28, 1898 (30 Stat., 495), reads as follows:

"That there shall be a commission in each town for each one of the Chickasaw, Choctaw, Creek, and Cherokee tribes, to consist of one member to be appointed by the executive of the tribe, who shall not be interested in town property, other than his home; one person to be appointed by the Secretary of the Interior, and one member to be selected by the town. And if the executive of the tribe or the town fail to select members as aforesaid, they may be selected and appointed by the Secretary of the Interior.

"Said commissions shall cause to be surveyed and laid out town sites where towns with a present population of two hundred or more are located, conforming to the existing survey, so far as may be, with proper

and necessary streets, alleys, and public grounds, including parks and cemeteries, giving to each town such territory as may be required for its present needs and reasonable prospective growth; and shall prepare correct plats thereof, and file one with the Secretary of the Interior, one with the clerk of the United States court, one with the authorities of the tribe, and one with the town authorities. And all town lots shall be appraised by said commission at their true value, excluding improvements; and separate appraisements shall be made of all improvements thereon; and no such appraisement shall be effective until approved by the Secretary of the Interior, and in case of disagreement by the members of such commission as to the value of any lot the Secretary may fix the value thereof.

"The owner of the improvements upon any town lot, other than fencing, tillage, or temporary buildings, may deposit in the United States Treasury, Saint Louis, Missouri, one-half of such appraised value; ten per centum within two months and fifteen per centum more within six months after notice of appraisement, and the remainder in three equal installments thereafter, depositing with the Secretary of the Interior one receipt for each payment, and one with the authorities of the tribe, and such deposit shall be deemed a tender to the tribe of the purchase money for such lot.

"If the owner of such improvements on any lot fails to make deposit of the purchase money as aforesaid, then such lot may be sold in the manner herein provided for the sale of unimproved lots; and when the purchaser thereof has complied with the requirements herein for the purchase of improved lots he may, by petition, apply to the United States Court within whose jurisdiction the town is located for condemnation and appraisement of such improvements, and petitioner shall, after

judgment, deposit the value so fixed with the clerk of the court; and thereupon the defendant shall be required to accept the same in full payment for his improvements or remove same from the lot within such time as may be fixed by the court.

"All town lots not improved as aforesaid shall belong to the tribe, and shall be in like manner appraised, and, after approval by the Secretary of the Interior, and due notice, sold to the highest bidder at public auction by said commission, but not for less than their appraised value, unless ordered by the Secretary of the Interior; and purchasers may in like manner make deposits of the purchase money with like effect, as in case of improved lots.

"The inhabitants of any town may, within one year after the completion of the survey thereof, make such deposit of ten dollars per acre for parks, cemeteries, and other public grounds laid out by said commission with like effect as for improved lots; and such parks and public grounds shall not be used for any purpose until such deposits are made.

"The person authorized by the tribe or tribes may execute or deliver to any such purchaser, without expense to him, a deed conveying to him the title of such lands or town lots; and thereafter the purchase money shall become the property of the tribe; and all such moneys shall, when titles to all the lots in the towns belonging to any tribe have been thus perfected, be paid per capita to the members of the tribe: *Provided, however*, That in those town sites designated and laid out under the provisions of this act where coal leases are now being operated and coal is being mined there shall be reserved from the appraisement and sale all lots occupied by houses of miners actually engaged in min-

ing, and only while they are so engaged, and in addition thereto a sufficient amount of land, to be determined by the appraisers, to furnish homes for the men actually engaged in working for the lessees operating said mines and a sufficient amount for all buildings and machinery for mining purposes: *And provided further*, That when the lessees shall cease to operate said mines, then, and in that event, the lots of land so reserved shall be disposed of as provided for in this act."

The agreement between the Commission to the Five Civilized Tribes and the Choctaw and Chickasaw Tribes of Indians, entered into on April 23, 1897, as amended, ratified and confirmed in the Act of Congress approved June 28, 1898, known as the "Curtis Act" (30 Stat., 495), provides as to town sites as follows:

"It is further agreed that there shall be appointed a commission for each of the two nations. Each commission shall consist of one member, to be appointed by the executive of the tribe for which said commission is to act, who shall not be interested in town property other than his home, and one to be appointed by the President of the United States. Each of said commissions shall lay out town sites, to be restricted as far as possible to their present limits, where towns are now located in the nation for which said commission is appointed. Said commission shall have prepared correct and proper plats of each town, and file one in the clerk's office of the United States district court for the district in which the town is located, and one with the principal chief or governor of the nation in which the town is located, and one with the Secretary of the Interior, to be approved by him before the same shall take effect. When said towns are so laid out, each lot on which permanent, substantial, and valuable improvements other than fences, tillage, and temporary houses,

have been made, shall be valued by the commission provided for the nation in which the town is located at the price a fee-simple title to the same would bring in the market at the time the valuation is made, but not to include in such value the improvements thereon. The owner of the improvements on each lot shall have the right to buy one residence and one business lot at fifty per centum of the appraised value of such improved property, and the remainder of such improved property at sixty-two and one-half per centum of the said market value within sixty days from date of notice served on him that such lot is for sale, and if he purchases the same he shall, within ten days from his purchase, pay into the Treasury of the United States one-fourth of the purchase price, and the balance in three equal annual installments, and when the entire sum is paid shall be entitled to a patent for the same. In case the two members of the commission fail to agree as to the market value of any lot, or the limit or extent of said town, either of said commissioners may report any such disagreement to the judge of the district in which such town is located, who shall appoint a third member to act with the said commission, who is not interested in town lots, who shall act with them to determine said value.

"If such owner of the improvements on any lot fails within sixty days to purchase and make the first payment on same, such lot, with the improvements thereon, shall be sold at public auction to the highest bidder, under the direction of the aforesaid commission, and the purchaser at such sale shall pay to the owner of the improvements the price for which said lot shall be sold, less sixty-two and one-half per cent of said appraisceded value of the lot, and shall pay into the Treasury, under regulations to be established by the Secretary of the

Interior, in four installments, as hereinbefore provided. The commission shall have the right to reject any bid on such lot which they consider below its value.

"All lots not so appraised shall be sold from time to time at public auction (after proper advertisement) by the commission for the nation in which the town is located, as may seem for the best interest of the nations and the proper development of each town, the purchase price to be paid in four installments, as hereinbefore provided for improved lots. The commission shall have the right to reject any bid for such lots which they consider below its value.

"All the payments herein provided for shall be made under the direction of the Secretary of the Interior into the United States Treasury, a failure of sixty days to make any one payment to be a forfeiture of all payments made and all rights under the contract: *Provided*, That the purchaser of any lot shall have the option of paying the entire price of the lot before the same is due.

"No tax shall be assessed by any town government against any town lot unsold by the commission, and no tax levied against a lot sold, as herein provided, shall constitute a lien on same till the purchase price thereof has been fully paid to the nation.

"The money paid into the United States Treasury for the sale of all town lots shall be for the benefit of the members of the Choctaw and Chickasaw tribes (freedmen excepted), and at the end of one year from the ratification of the agreement, and at the end of each year thereafter, the funds so accumulated shall be divided and paid to the Choctaws and Chickasaws (freedmen excepted), each member of the two tribes to receive an equal portion thereof.

"That no law or ordinance shall be passed by any

town which interferes with the enforcement of or is in conflict with the laws of the United States in force in said Territory, and all persons in such towns shall be subject to said laws, and the United States agrees to maintain strict laws in the territory of the Choctaw and Chickasaw tribes against the introduction, sale, barter, or giving away of liquors and intoxicants of any kind or qualty.

"That said commission shall be authorized to locate, within a suitable distance from each town site, not to exceed five acres to be used as a cemetery, and when any town has paid into the United States Treasury, to be part of the fund arising from the sale of town lots, ten dollars per acre therefor, such town shall be entitled to a patent for the same, as herein provided for titles to allottees, and shall dispose of same at reasonable prices in suitable lots for burial purposes, the proceeds derived from such sales to be applied by the town government to the proper improvement and care of said cemetery.

"That no charge or claim shall be made against the Choctaw or Chickasaw tribes by the United States for the expenses of surveying and platting the lands and town sites, or for grading, appraising, and allotting the lands or for appraising and disposing of the town lots as herein provided.

"That the land adjacent to Fort Smith, and lands for court-houses, jails, and other public purposes excepted from allotment, shall be disposed of in the same manner and for the same purposes as provided for town lots herein, but not till the Choctaw and Chickasaw councils shall direct such disposition to be made thereof, and said land adjacent thereto shall be placed under the jurisdiction of the city of Fort, Smith, Arkansas, for police purposes.

"There shall be set apart and exempted from appraisement and sale in the towns lots upon which churches and parsonages are now built and occupied, not to exceed fifty feet front and one hundred feet deep for each church or parsonage: *Provided*, That such lots shall only be used for churches and parsonages, and when they cease to be used shall revert to the members of the tribes to be disposed of as other town lots: *Provided further*, That these lots may be sold by the churches for which they are set apart if the purchase money therefor is invested in other lot or lots in the same town, to be used for the same purpose and with the same conditions and limitations."

The act of Congress entitled "An Act to Ratify and Confirm an Agreement with the Muskogee or Creek Tribe of Indians, and for Other Purposes," approved March 1, 1901, (31 Stat., 861), and which ratified the Creek Agreement of March 8, 1900, provides as to townsites as follows:

"All towns in the Creek Nation having a present population of two hundred or more shall, and all others may, be surveyed, laid out, and appraised under the provisions of an act of Congress entitled "An act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, nineteen hundred and one, and for other purposes," approved May thirty-first, nineteen hundred, which said provisions are as follows:

"That the Secretary of the Interior is hereby authorized, under rules and regulations to be prescribed by him, to survey, lay out, and plat into town lots, streets, alleys, and parks the sites of such towns and villages in the Choctaw, Chickasaw, Creek, and Cherokee na-

tions, as may at that time have a population of two hundred or more, in such manner as will best subserve the then present needs and the reasonable prospective growth of such towns. The work of surveying, laying out, and platting such town sites shall be done by competent surveyors, who shall prepare five copies of the plat of each town site, which, when the survey is approved by the Secretary of the Interior, shall be filed as follows: One in the office of the Commissioner of Indian Affairs, one with the principal chief of the nation, one with the clerk of the court within the territorial jurisdiction of which the town is located, one with the clerk of the court within the territorial jurisdiction of which the town is located, one with the Commission to the Five Civilized Tribes, and one with the town authorities, if there be such. Where in his judgment the best interests of the public service require the Secretary of the Interior may secure the surveying, laying out, and plating of town sites in any of the said nations by contract.

"Hereafter the work of the respective town-site commissions provided for in the agreement with the Choctaw and Chickasaw tribes ratified in section twenty-nine of the act of June twenty-eighth, eighteen hundred and ninety-eight, entitled "An act for the protection of the people of the Indian Territory, and for other purposes," shall begin as to any town site immediately upon the approval of the survey by the Secretary of the Interior, and not before.

"The Secretary of the Interior may, in his discretion, appoint a town-site commission consisting of three members for each of the Creek and Cherokee nations, at least one of whom shall be a citizen of the tribe and shall be appointed upon the nomination of the principal chief of the tribe. Each commission, under the super-

vision of the Secretary of the Interior, shall appraise and sell for the benefit of the tribe the town lots in the nation for which it is appointed, acting in conformity with the provisions of any then existing act of Congress or agreement with the tribe approved by Congress. The agreement of any two members of the commission as to the true value of any lot shall constitute a determination thereof, subject to the approval of the Secretary of the Interior, and if no two members are able to agree the matter shall be determined by such Secretary.

"Where in his judgment the public interests will be thereby subserved, the Secretary of the Interior may appoint in the Choctaw, Chickasaw, Creek, or Cherokee Nation a separate town-site commission for any town, in which event as to that town such local commission may exercise the same authority and perform the same duties which would otherwise devolve upon the commission for that nation. Every such local commission shall be appointed in the manner provided in the act approved June twenty-eighth, eighteen hundred and ninety-eight, entitled "An act for the protection of the people of the Indian Territory."

"The Secretary of the Interior, where in his judgment the public interests will be thereby subserved, may permit the authorities of any town in any of said nations, at the expense of the town, to survey, lay out, and plat the site thereof, subject to his supervision and approval, as in other instances.

"As soon as the plat of any town site is approved, the proper commission shall with all reasonable dispatch and within a limited time, to be prescribed by the Secretary of the Interior, proceed to make the appraisement of the lots and improvements, if any, thereon, and after the approval thereof by the Secretary of

the Interior, shall, under the supervision of such Secretary, proceed to the disposition and sale of the lots in conformity with any then existing act of Congress or agreement with the tribe approved by Congress, and if the proper commission shall not complete such appraisement and sale within the time limited by the Secretary of the Interior, they shall receive no pay for such additional time as may be taken by them, unless the Secretary of the Interior for good cause shown shall expressly direct otherwise.

"The Secretary of the Interior may, for good cause, remove any member of any town-site commission, tribal or local, in any of said nations, and may fill the vacancy thereby made or any vacancy otherwise occuring in like manner as the place was originally filled.

"It shall not be required that the town-site limits established in the course of the platting and disposing of town lots and the corporate limits of the town, if incorporated, shall be identical or co-extensive, but such town-site limits and corporate limits shall be so established as to best subserve the then present needs and the reasonable prospective growth of the town, as the same shall appear at the times when such limits are respectively established: *Provided Further*, That the exterior limits of all town sites shall be designated and fixed at the earliest practicable time under rules and regulations prescribed by the Secretary of the Interior.

"Upon the recommendation of the Commission to the Five Civilized Tribes the Secretary of the Interior is hereby authorized at any time before allotment to set aside and reserve from allotment any lands in the Choctaw, Chickasaw, Creek, or Cherokee nations, not exceeding one hundred and sixty acres in any one tract, at such stations as are or shall be established in con-

formity with law on the line of any railroad which shall be constructed or be in process of construction in or through either of said nations prior to the allotment of the lands therein, and this irrespective of the population of such town site at the time. Such town sites shall be surveyed, laid out, and platted, and the lands therein disposed of for the benefit of the tribe in the manner herein prescribed for other town sites: *Provided Further*, That whenever any tract of land shall be set aside as herein provided which is occupied by a member of the tribe, such occupant shall be fully compensated for his improvements thereon under such rules and regulations as may be prescribed by the Secretary of the Interior: *Provided*, That hereafter the Secretary of the Interior, may, whenever the chief executive or principal chief of said nation fails or refuses to appoint a town-site commissioner for any town or to fill any vacancy caused by the neglect or refusal of the town site commissioner appointed by the chief executive or principal chief of said nation to qualify or act, in his discretion, appoint a commissioner to fill the vacancy thus created."

Sections 11, 12, 13 and 14 of the same Act provide as follows:

"Any person in rightful possession of any town lot having improvements thereon, other than temporary buildings, fencing, and tillage, shall have the right to purchase such lot by paying one-half of the appraised value thereof, but if he shall fail within sixty days to purchase such lot and make the first payment thereon, as herein provided, the lot and improvements shall be sold at public auction to the highest bidder, under direction of the appraisement commission, at a price not less than their appraised value, and the purchaser shall pay the purchase price to the owner of the improvements, less the appraised value of the lot.

"Any person having the right of occupancy of a residence or business lot, or both, in any town, whether improved or not, and owning no other lot or land therein, shall have the right to purchase such lot by paying one-half of the appraised value thereof.

"Any person holding lands within a town occupied by him as a home, also any person who had at the time of signing this agreement purchased any lot, tract, or parcel of land from any person in legal possession at the time, shall have the right to purchase the lot embraced in same by paying one-half of the appraised value thereof, not, however, exceeding four acres.

"All town lots not having thereon improvements, other than temporary buildings, fencing, and tillage, the sale or disposition of which is not herein otherwise specifically provided for, shall be sold within twelve months after their appraisement, under direction of the Secretary of the Interior, after due advertisement, at public auction to the highest bidder at not less than their appraised value.

"Any person having the right of occupancy of lands in any town which has been or may be laid out into town lots, to be sold at public auction as above, shall have the right to purchase one-fourth of all the lots into which such lands may have been divided at two-thirds of their appraised value.

Section 11 of the act of Congress entitled "An act to ratify and confirm a supplemental agreement with the Creek Tribe of Indians, and for other purposes," approved June 30, 1902 (32 Stat. 500), reads as follows:

"In all instances of the establishment of town sites in accordance with the provisions of the act of Congress approved May 31, 1900 (31Stat. L., 231), or those of Section 10 of the agreement ratified by act of Congress approved March 1, 1901 (31 Stat. L., 861), authoriz-

ing the Secretary of the Interior, upon the recommendation of the Commission to the Five Civilized Tribes, at any time before allotment, to set aside and reserve from allotment any lands in the Creek Nation, not exceeding 160 acres in any one tract, at such stations as are or shall be established in conformity with law on the line of any railroad which shall be constructed, or be in process of construction, in or through said nation prior to the allotment of lands therein, any citizen who shall have previously selected such town site, or any portion thereof, for his allotment, or who shall have been by reason of improvements therein entitled to select the same for his allotment, shall be paid by the Creek Nation the full value of his improvements thereon at the time of the establishment of the town site, under rules and regulations to be prescribed by the Secretary of the Interior: *Provided, However*, That such citizens may purchase any of said lands in accordance with the provisions of the act of March 1, 1901 (31 Stat. L., 61): *And Provided Further*, That the lands which may hereafter be set aside and reserved for town sites upon recommendation of the Dawes Commission as herein provided shall embrace such acreage as may be necessary for the present needs and reasonable prospective growth of such town sites, and not to exceed 640 acres for each town site, and 10 per cent of the net proceeds arising from the sale of that portion of the land within the town site so selected by him, or which he was so entitled to select; and this shall be in addition to his right to receive from other lands an allotment of 160 acres."

Sections 45 and 54 both inclusive of the act of Congress entitled "An act to ratify and confirm an agreement with the Choctaw and Chickasaw Tribes of Indians, and for other purposes," approved July 1, 1902 (32 Stat. page 641), reads as follows:

"The Choctaw and Chickasaw tribes hereby assent to the act of Congress approved May 31, 1900 (31 Stat., 221), in so far as it pertains to town sites in the Choctaw and Chickasaw nations, ratifying and confirming all acts of the Government of the United States thereunder, and consent to a continuance of the provisions of said act not in conflict with the terms of this agreement.

"As to those town sites heretofore set aside by the Secretary of the Interior on the recommendation of the Commission to the Five Civilized Tribes, as provided in said act of Congress of May 31, 1900, such additional acreage may be added thereto, in like manner as the original town site was set apart, as may be necessary for the present needs and reasonable prospective growth of said town sites, the total acreage not to exceed six hundred and forty acres for each town site.

"The lands which may hereafter be set aside and reserved for town sites upon the recommendation of the Commission to the Five Civilized Tribes, under the provisions of said act of May 31, 1900, shall embrace such acreage as may be necessary for the present needs and reasonable prospective growth of such town sites, not to exceed six hundred and forty acres for each town site.

"Whenever any tract of land shall be set aside for town-site purposes, as provided in said act of May 31, 1900, or by the terms of this agreement, which is occupied by any member of the Choctaw or Chickasaw nations, such occupant shall be fully compensated for his improvements thereon, out of the funds of the tribes arising from the sale of town sites, under rules and regulations to be prescribed by the Secretary of the Interior, the value of such improvements to be determined

by a board of appraisers, one member of which shall be appointed by the Secretary of the Interior, one by the chief executive of the tribe in which the town site is located, and one by the occupant of the land, said board of appraisers to be paid such compensation for their services as may be determined by the Secretary of the Interior out of any appropriation for surveying, laying out, platting, and selling town sites.

"Whenever the chief executive of the Choctaw or Chickasaw Nation fails or refuses to appoint a town-site commissioner for any town, or to fill any vacancy caused by the neglect or refusal of the town-site commissioner appointed by the chief executive of the Choctaw or Chickasaw Nation to qualify or act, or otherwise, the Secretary of the Interior, in his discretion, may appoint a commissioner to fill the vacancy thus created.

"There shall be appointed, in the manner provided in the Atoka agreement, such additional town-site commissions as the Secretary of the Interior may deem necessary, for the speedy disposal of all town sites in said nations: *Provided*, That the jurisdiction of said additional town-site commissions shall extend to such town sites only as shall be designated by the Secretary of the Interior.

"Upon the payment of the full amount of the purchase price of any lot in any town site in the Choctaw and Chickasaw nations, appraised and sold as herein provided, or sold as herein provided, the chief executives of said nations shall jointly execute, under their hands and the seals of the respective nations and deliver to the purchaser of the said lot a patent conveying to him all right, title, and interest of the Choctaw and Chickasaw tribes in and to said lot.

"All town lots in any one town site to be conveyed to one person shall, as far as practicable, be included in one patent, and all patents shall be executed free of charge to the grantee.

"Such towns in the Choctaw and Chickasaw nations as may have a population of less than two hundred people, not otherwise provided for, and which in the judgment of the Secretary of the Interior should be set aside as town sites, shall have their limits defined not later than ninety days after the final ratification of this agreement, in the same manner as herein provided for other town sites; but in no such case shall more than forty acres of land be set aside for any such town site.

"All town sites heretofore set aside by the Secretary of the Interior on the recommendation of the Commission to the Five Civilized Tribes, under the provisions of the act of Congress approved May 31, 1900 (31 Stat., 221), with the additional acreage added thereto, and all town sites which may hereafter be set aside, as well as all town sites set aside under the provisions of this agreement having a population of less than two hundred, shall be surveyed, laid, out, platted, appraised, and disposed of in a like manner, and with like preference rights accorded to owners of improvements as other town sites in the Choctaw and Chickasaw nations are surveyed, laid out, platted, appraised, and disposed of under the Atoka agreement, as modified or supplemented by the said act of May 31, 1900: *Provided*, That occupants or purchasers of lots in town sites in said Choctaw and Chickasaw nations upon which no improvements have been made prior to the passage of this act by Congress shall pay the full appraised value of said lots instead of the percentage named in the Atoka agreement."

An act of Congress entitled "An act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian Tribes for the fiscal year ending June thirtieth, nineteen hundred and one, and for other purposes," approved May 31, 1900 (31 Stat., 221), referred to in Section 45 of the Act of Congress approved July 1, 1902, above quoted, provides among other things as follows:

"To pay all expenses incident to the survey, platting, and appraisement of town sites in the Choctaw, Chickasaw, Creek, and Cherokee nations, Indian Territory, as required by sections fifteen and twenty-nine of an Act entitled "An Act for the protection of the people of the Indian Territory, and for other purposes," approved June twenty-eighth, eighteen hundred and ninety-eight, for the balance of the current year and for the year ending June thirtieth, nineteen hundred and one, the same to be immediately available, sixty-seven thousand dollars, or so much as may be necessary: *Provided*, That the Secretary of the Interior is hereby authorized, under rules and regulations to be prescribed by him, to survey, lay out, and plat into town lots, streets, alleys, and parks, the sites of such towns and villages in the Choctaw, Creek, and Cherokee nations, as may at that time have a population of two hundred or more, in such manner as will best subserve the then present needs and the reasonable prospective growth of such towns. The work of surveying, laying out, and platting such town sites shall be done by competent surveyors, who shall prepare five copies of the plat of each town site which, when the survey is approved by the Secretary of the Interior, shall be filed as follows: One in the office of the Commissioner of Indian Affairs, one with the principal chief of the nation, one with clerk of the court within the

territorial jurisdiction of which the town is located, one with the Commission to the Five Civilized Tribes, and one with the town authorities, if there be such. Where in his judgment the best interests of the public service require, the Secretary of the Interior may secure the surveying, laying out, and platting of town sites in any of said nations by contract.

"Hereafter the work of the respective town-site commissions provided for in the agreement with the Choctaw and Chickasaw tribes ratified in section twenty-nine of the Act of June twenty-eighth, eighteen hundred and ninety-eight, entitled "An Act for the protection of the people of the Indian Territory, and for other purposes," shall begin as to any town site immediately upon the approval of the survey by the Secretary of the Interior and not before.

"The Secretary of the Interior may in his discretion appoint a town-site commission consisting of three members for each of the Creek and Cherokee nations, at least one of whom shall be a citizen of the tribe and shall be appointed upon the nomination of the principal chief of the tribe. Each commission, under the supervision of the Secretary of the Interior, shall appraise and sell for the benefit of the tribe the town lots in the nation for which it is appointed, acting in conformity with the provisions of any then existing Act of Congress or agreement with the tribe approved by Congress. The agreement of any two members of the commission as to the true value of any lot shall constitute a determination thereof, subject to the approval of the Secretary of the Interior, and if no two members are able to agree the matter shall be determined by such Secretary.

"Where in his judgment the public interests will be thereby subserved, the Secretary of the Interior may

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appoint in the Choctaw, Chickasaw, Creek, or Cherokee Nation a separate town-site commission for any town, in which event as to that town such local commission may exercise the same authority and perform the same duties which would otherwise devolve upon the commission for that Nation. Every such local commission shall be appointed in the manner provided in the Act approved June twenty-eighth, eighteen hundred and ninety-eight, entitled "An Act for the protection of the people of the Indian Territory."

"The Secretary of the Interior, where in his judgment the public interests will be thereby subserved, may permit the authorities of any town in any of said nations, at the expense of the town to survey, lay out, and plat the site thereof, subject to his supervision and approval, as in other instances.

"As soon as the plat of any town site is approved, the proper commission shall, with all reasonable dispatch and within a limited time, to be prescribed by the Secretary of the Interior, proceed to make the appraisement of the lots and improvements, if any, thereon, and after the approval thereof by the Secretary of the Interior, shall, under the supervision of such Secretary, proceed to the disposition and sale of the lots in conformity with any then existing Act of Congress or agreement with the tribe approved by Congress, and if the proper commission shall not complete such appraisement and sale within the time limited by the Secretary of the Interior, they shall receive no pay for such additional time as may be taken by them, unless the Secretary of the Interior for good cause shown shall expressly direct otherwise.

"The Secretary of the Interior may, for good cause, remove any member of any town-site commission, tribal

or local, in any of said nations, and may fill the vacancy thereby made or any vacancy otherwise occurring in like manner as the place was originally filled.

"It shall not be required that the townsite limits established in the course of the platting and disposing of town lots and the corporate limits of the town, if incorporated, shall be identical or coextensive, but such town-site limits and corporate limits shall be so established as to best subserve the then present needs and the reasonable prospective growth of the town, as the same shall appear at the times when such limits are respectively established: *Provided further*, That the exterior limits of all town sites shall be designated and fixed at the earliest practicable time under rules and regulations prescribed by the Secretary of the Interior.

"Upon the recommendation of the Commission to the Five Civilized Tribes the Secretary of the Interior is hereby authorized at any time before allotment to set aside and reserve from allotment any lands in the Choctaw, Chickasaw, Creek, or Cherokee nations, not exceeding one hundred and sixty acres in any one tract, at such stations as are or shall be established in conformity with law on the line of any railroad which shall be constructed or be in process of construction in or through either of said nations prior to the allotment of the lands therein, and this irrespective of the population of such town site at the time. Such town sites shall be surveyed, laid out, and platted, and the lands therein disposed of for the benefit of the tribe in the manner herein prescribed for other town sites: *Provided further*, That whenever any tract of land shall be set aside as herein provided which is occupied by a member of the tribe, such occupant shall be fully compensated for his improvements thereon under such rules and regulations as may be prescribed by the Secretary of the Interior.

"Nothing herein contained shall have the effect of avoiding any work heretofore done in pursuance of the said act of June twenty-eighth, eighteen hundred and ninety-eight, in the way of surveying, laying out, or platting of town sites, appraising or disposing of town lots in any of said nations, but the same, if not heretofore carried to a state of completion, may be completed according to the provisions hereof."

Sections 38 to 48, both inclusive, of the act of Congress entitled "An Act to provide for the allotment of the lands of the Cherokee Nation, for the disposition of town sites therein, and for other purposes," approved July 1, 1902 (32 Stat., 716), being a ratification of the Cherokee agreement, reads as follows:

"The lands which may hereafter be set aside and reserved for town sites upon the recommendation of the Dawes Commission under the provisions of the act of Congress approved May thirty-first, nineteen hundred (Thirty-first Statutes, page two hundred and twenty-one), shall embrace such acreage as may be necessary for the present needs and reasonable prospective growth of such town sites, not to exceed six hundred and forty acres for each town site.

"Whenever any tract of land shall be set aside by the Secretary of the Interior for town-site purposes, as provided in this act, which is occupied at the time of such segregation by any member of the Cherokee Nation, such occupant shall be allowed to purchase any lot upon which he then has improvements other than fences, tillage, and temporary improvements, in accordance with the provisions of the act of June twenty-eighth, eighteen hundred and ninety-eight (Thirtieth Statutes, page four hundred and ninety-five), or, if he so elects, the lot will be sold under rules and regula-

tions to be prescribed by the Secretary of the Interior, and he shall be fully compensated for his improvements thereon out of the funds of the tribe arising from the sale of the town sites, the value of such improvements to be determined by a board of appraisers, one member of which shall be appointed by the Secretary of the Interior, one by the chief executive of the tribe, and one by the occupant of the land, said board of appraisers to be paid such compensation for their services as may be determined by the Secretary of the Interior out of any appropriations for surveying, laying out, platting, and selling town sites.

"All town sites which may hereafter be set aside by the Secretary of the Interior on the recommendation of the Commission to the Five Civilized Tribes, under the provisions of the act of Congress approved May thirty-first, nineteen hundred (Thirty-first Statutes, page two hundred and twenty-one), with the additional acreage added thereto, as well as all town sites set aside under the provisions of this act having a population of less than two hundred, shall be surveyed, laid out, platted, appraised, and disposed of in like manner, and with like preference rights accorded to owners of improvements as other town sites in the Cherokee Nation are surveyed, laid out, platted, appraised, and disposed of under the act of Congress of June twenty-eighth, eighteen hundred and ninety-eight (Thirtieth Statutes, page four hundred and ninety-five), as modified or supplemented by the act of May thirty-first, nineteen hundred: *Provided*, That as to the town sites set aside as aforesaid, the owner of the improvements shall be required to pay the full appraised value of the lot instead of the percentage named in said act of June twenty-eighth, eighteen hundred and ninety-eight (Thirtieth Statutes, page four hundred and ninety-five.

"Any person being in possession or having the right to the possession of any town lot or lots, as surveyed and platted under the direction of the Secretary of the Interior, in accordance with the act of Congress approved May thirty-first, nineteen hundred (Thirty-first Statutes, page two hundred and twenty-one), the occupancy of which lot or lots was originally acquired under any town-site act of the Cherokee Nation, and owning improvements thereon, other than temporary buildings, fencing, or tillage, shall have the right to purchase the same at one-fourth of the appraised value thereof.

"Any person being in possession of, or having the right to the possession of, any town lot or lots, as surveyed and platted under the direction of the Secretary of the Interior, in accordance with the act of Congress approved May thirty-first, nineteen hundred (Thirty-first Statutes, page two hundred and twenty-one), the occupancy of which lot or lots was originally acquired under any town-site act of the Cherokee Nation, and not having any improvements thereon, shall have the right to purchase the same at one-half of the appraised value thereof.

"Any citizen in rightful possession of any town lot having improvements thereon other than temporary buildings, fencing, and tillage, the occupancy of which has not been acquired under tribal laws, shall have the right to purchase same by paying one-half the appraised value thereof: *Provided*, That any other person in undisputed possession of any town lot having improvements thereon other than temporary buildings, fencing, and tillage, the occupancy of which has not been acquired under tribal laws, shall have the right to purchase such lot by paying the appraised value thereof.

"All lots not having thereon improvements other than temporary buildings, fencing, and tillage, the sale or

disposition of which is not herein otherwise specifically provided for, shall be sold within twelve months after appraisement, under the direction of the Secretary of the Interior, after due advertisement, at public auction, to the highest bidder, at not less than their appraised value.

"When the appraisement of any town lot is made and approved, the town-site commission shall notify the claimant thereof of the amount of appraisement, and he shall, within sixty days thereafter, make payment of ten per centum of the amount due for the lot, and four months thereafter he shall pay fifteen per centum additional, and the remainder of the purchase money he shall pay in three equal annual installments without interest; but if the claimant of any such lot fail to purchase same or make the first and second payments aforesaid or make any other payment within the time specified, the lot and improvements shall be sold at public auction to the highest bidder, under the direction of the Secretary of the Interior, at a price not less than its appraised value.

"When any improved lot shall be sold at public auction because of the failure of the person owning improvements thereon to purchase same within the time allowed in said act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, (Thirtieth Statutes, page four hundred and ninety-five), said improvements shall be appraised by a committee, one member of which shall be selected by the owner of the improvements and one member by the purchaser of said lot; and in case the said Committee is not able to agree upon the value of said improvements, the committee may select a third member, and in that event the determination of the majority of the committee shall control. Said committee of appraisement shall be paid such com-

pensation for their services by the two parties in interest, share and share alike, as may be agreed upon, and the amount of said appraisement shall be paid by the purchaser of the lot to the owner of the improvements in cash within thirty days after the decision of the committee of appraisement.

"The purchaser of any unimproved town lot sold at public aution shall pay twenty-five per centum of the purchase money at the time of the sale, and within four months thereafter he shall pay twenty-five per centum additional, and the remainder of the purchase money he shall pay in two equal annual installments without interest.

"Such towns in the Cherokee Nation as may have a population of less than two hundred people not otherwise provided for, and which, in the judgment of the Secretary of the Interior, should be set aside as town sites, shall have their limits defined as soon as practicable after the approval of this act in the same manner as provided for other town sites."

And Sections 55 and 56 of the same Act read as follows:

"The purchaser of any town lot may at any time pay the full amount of the purchase money, and he shall thereupon receive title therefor.

"Any person may bid for and purchase any lot sold at public auction as herein provided."

The act of Congress of March 3, 1903 (Appropriation act), 32 Stat., 982, provides among other things as follows:

"To pay all expenses incident to the survey, platting, and appraisement of town sites in the Choctaw, Chicka-

saw, Creek, and Cherokee nations, Indian Territory, as required by sections fifteen and twenty-nine of an act entitled "An act for the protection of the people of the Indian Territory, and for other purposes," approved June twenty-eighth, eighteen hundred and ninety-eight, and all acts amendatory thereof or supplemental thereto, twenty-five thousand dollars: *Provided*, That the money hereby appropriated shall be applied only to the expenses incident to the survey, platting, and appraisement of town sites heretofore set aside and reserved from allotment: *And provided further*, That nothing herein contained shall prevent the survey and platting, at their own expense, of town sites by private parties where stations are located along the lines of railroads, nor the unrestricted alienation of lands for such purposes, when recommended by the Commission to the Five Civilized Tribes and approved by the Secretary of the Interior. That hereafter the Secretary of the Interior may, whenever the chief executive of the Choctaw or Chickasaw nations fails or refuses to appoint a town-site commissioner for any town, or to fill any vacancy caused by the neglect or refusal of the town-site commissioner appointed by the chief executive of the Choctaw or Chickasaw nations to qualify or act, in his discretion, appoint a commissioner to fill the vacancy thus created."

Section 12 of the act of Congress entitled "An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes," approved April 26, 1906 (Public No. 129), reads as follows:

"That the Secretary of the Interior is authorized to sell, upon such terms and under such rules and regulations as he may prescribe, all lots in towns in the Choctaw and Chickasaw nations reserved from ap-

praisement and sale for use in connection with the operation of coal and asphalt mining leases or for the occupancy of miners actually engaged in working for lessees operating coal and asphalt mines, the proceeds arising from such sale to be deposited in the Treasury of the United States as are other funds of said tribes.

"If the purchaser of any town lot sold under the provisions of law regarding the sale of town sites in the Choctaw, Chickasaw, Cherokee, Creek, or Seminole nations fail for sixty days after approval hereof to pay the purchase price or any installment thereof then due, or shall fail for thirty days to pay the purchase price or any installment thereof falling due hereafter, he shall forfeit all rights under his purchase, together with all money paid thereunder, and the Secretary of the Interior may cause the lots upon which such forfeiture is made to be resold at public auction for cash, under such rules and regulations as he may prescribe. All municipal corporations in the Indian Territory are hereby authorized to vacate streets and alleys, or parts thereof, and said streets and alleys, when vacated, shall revert to and become the property of the abutting property owners."

EXHIBIT 35

LIST OF TOWNS WITH DESCRIPTION OF AREAS, THE PLATS OF WHICH HAVE BEEN APPROVED BY THE SECRETARY OF THE INTERIOR, WITHIN TWENTY (20) MILES OF THE RIGHT OF WAY OF THE M., K. & T. RAILWAY CO. FROM THE KANSAS LINE TO THE RED RIVER, IN INDIAN TERRITORY.

ATOKA.

Beginning at the quarter Sec. Cor. between Sections 11 and 14, T. 2 S., R. 11 E.; thence running west, variation 8 degrees 10 minutes East 990 ft., to a point; thence north 330 ft. to a point; thence west 1,980 ft. to a point; thence south 1,320 ft. to a point; thence west 330 ft. to a point; thence south 1,650 ft. to a point; thence west 660 ft. to a point; thence south 660 ft. to a point; thence west 990 ft. to a point; thence south 990 ft. to a point; thence east 1,033 ft. to a point at the intersection of the east boundary of the right of way of the M., K. & T. Railroad, said point being 129.7 feet east of center of track of main line of said railroad as now constructed; thence N. 38 degrees 42 minutes E., parallel to center line of main track of said railroad, distant 100 ft. at right angles from the same and curving 1 degree 0 minute to the right, for a distance of 1,393 feet, to a point; thence N. 53 degrees 42 minutes E., parallel to center line of main track of said railroad and 100 ft. distant from the same, 606.9 ft. to a point which is 330 ft. south and 220 ft. east of the quarter section corner between sections 14 and 15, T. 2 S., R. 11 E.; thence east 1,760 ft. to a point; thence north 330 ft. to a point; thence east 330 ft. to a point; thence north 660 ft. to a point; thence east 330 ft. to a point; thence north 1,980 ft. to the point of beginning, and containing 272 acres, more or less.

ALBANY.

S W quarter of S W quarter of S W quarter of Sec. 4, T. 8 S., R. 11 E.

W half of S E quarter of S W quarter of S W quarter, Sec. 4, T. 8 S., R. 11 E.

S half of N E quarter of S E quarter of S E quarter, Sec. 5, T. 8 S., R. 11 E.

S E quarter of S E quarter of S E quarter, Sec. 5, T. 8 S., R. 11 E.

E half of N E quarter of N E quarter, Sec. 8, T. 8 S., R. 11. E.

E half of W half of N E quarter of N E quarter, Sec. 8, T. 8 S., R. 11 E.

W half of E half of N W quarter of N W quarter, Sec. 9, T. 8 S., R. 11 E.

W half of N W quarter of N W quarter, Cemetery, Sec. 9, T. 8 S., R. 11 E.

N half of N W quarter of S E quarter of N E quarter, 95 acres, Sec. 8, T. 8 S., R. 11 E.

AYLESWORTH.

S half of S W quarter of S W quarter of Sec. 17, T. 6 S., R. 7 E.

N half of N W quarter of N W quarter of Sec. 20, T. 6 S., R. 7 E., 40 acres.

ALDERSON.

N E quarter of N W quarter of S W quarter of Sec. 14, T. 5 N., R. 15 E.

N half of S E quarter of N W quarter of S W quarter, Sec. 14, T. 5 N., R. 15 E.

N E quarter of S W quarter, Sec. 14, T. 5 N., R. 15 E.

S half of N W quarter of S E quarter, Sec. 14, T. 5 N., R. 15 E.

S W quarter of S E quarter, Sec. 14, T. 5 N., R. 15 E.

E half of S E quarter of S W quarter, Sec. 14, T. 5 N., R. 15 E.

E half of W half of S E quarter of S W quarter, Sec. 14, T. 5 N., R. 15 E.

N E quarter of N E quarter of N W quarter, Sec. 23, T. 5 N., R. 15 E.

N half of N W quarter of N E quarter, Sec. 23, T. 5 N., R. 15 E., 175 acres.

ADAIR.

E half of W half of S W quarter of S W quarter of Sec. 27, T. 23 N., R. 19 E.

E half of S W quarter of S W quarter, Sec. 27, T. 23 N., R. 19 E.

S half of N half of S half of S E quarter of S W quarter, Sec. 27, T. 23 N., R. 19 E.

S half of S half of S E quarter of S W quarter, Sec. 27, T. 23 N., R. 19 E.

E half of N E quarter of N E quarter, Sec. 33, T. 23 N., R. 19 E.

N half of N E quarter of S E quarter of N E quarter, Sec. 33, T. 23 N., R. 19 E.

N half of N half of N W quarter, Sec. 34, T. 23 N., R. 19 E.

N half of S half of N half of N W quarter, Sec. 34, T. 23 N., R. 19 E.

S half of S E quarter of N E quarter of N W quarter, Sec. 34, T. 23 N., R. 19 E.

S E quarter of S W quarter of N E quarter of N W quarter, Sec. 34, T. 23 N., R. 19 E.

N E quarter of N W quarter of S E quarter of N W quarter, Sec. 34, T. 23 N., R. 19 E.

S half of S W quarter of N W quarter of N E quarter, Sec. 34, T. 23 N., R. 19 E.

Cemetery:

E half of E half of N E quarter of N W quarter of S E quarter, Sec. 34, T. 23 N., R. 19 E.

W half of W half of N W quarter of N E quarter of S E quarter, Sec. 34, T. 23 N., R. 19 E.

150 acres.

AFTON.

E half of S E quarter of N W quarter of N W quarter of Sec. 32, T. 26 N., R. 22 E.

S W quarter of N E quarter of N W quarter, Sec. 32, T. 26 N., R. 22 E.

E half of N E quarter of N W quarter, Sec. 32, T. 26 N., R. 22 E.

E half of E half of S E quarter of N W quarter, Sec. 32, T. 26 N., R. 22 E.

N E quarter, Sec. 32, T. 26 N., R. 22 E.

S half of S half of N W quarter of N W quarter, Sec. 33, T. 26 N., R. 22 E.

S half of S W quarter of N E quarter of N W quarter, Sec. 33, T. 26 N., R. 22 E.

S W quarter of N W quarter, Sec. 33, T. 26 N., R. 22 E.

W half of S E quarter of N W quarter, Sec. 33, T. 26 N., R. 22 E.

W half of S E quarter of S E quarter of N W quarter, Sec. 33, T. 26 N., R. 22 E.

E half of E half of N E quarter of S W quarter, Sec. 32, T. 26 N., R. 22 E.

N half of S E quarter, Sec. 32, T. 26 N., R. 22 E.

N W quarter of S W quarter, Sec. 33, T. 26 N., R. 22 E.

N W quarter of N E quarter of S W quarter, Sec. 33, T. 26 N., R. 22 E.

W half of N E quarter of N E quarter of S W quarter, Sec. 33, T. 26 N., R. 22 E.

N W quarter of S E quarter of N E quarter of S W quarter, Sec. 33, T. 26 N., R. 22 E.

N half of S W quarter of N E quarter of S W quarter, Sec. 33, T. 26 N., R. 22 E.

N half of N W quarter of S W quarter of S W quarter, Sec. 33, T. 26 N., R. 22 E.

S W quarter of N W quarter of S W quarter of S W quarter of Sec. 33, T. 26 N., R. 22 E.

N W quarter of S W quarter of S W quarter of S W quarter, Sec. 33, T. 26 N., R. 22 E.

N half of S half of S E quarter, Sec. 32, T. 26 N., R 22 E.

N half of S E quarter of S E quarter of S E quarter, Sec. 32, T. 26 N., R. 22 E.

S W quarter of S E quarter of S E quarter, Sec. 32, T. 26 N., R. 22 E.

S E quarter of S W quarter of S E quarter, Sec. 32, T. 26 N., R. 22 E.

Cemetery:

N W quarter of N W quarter of N E quarter of S E quarter, Sec. 29, T. 26 N., R. 22 E.

N half of N E quarter of N W quarter of S E quarter, Sec. 29, T. 26 N., R. 22 E.

N half of N W quarter of N W quarter of S E quarter, Sec. 29, T. 26 N., R. 22 E.

N half of N E quarter of N E quarter of S W quarter, Sec. 29, T. 26 N., R. 22 E.

N E quarter of N W quarter of N. E. quarter of S W quarter, Sec. 29, T. 26 N., R. 22 E.

532.5 acres.

BOKCHITO.

N half of S W quarter, Sec. 22, T. 6 S., R. 11 E.

N half of S W quarter of S W quarter, Sec. 22, T. 6 S., R. 11 E.

N W quarter of S E quarter of S W quarter, Sec. 22, T. 6 S., R. 11 E.

N W quarter of S E quarter, Sec. 22, T. 6 S., R. 11 E.

S W quarter of N E quarter, Sec. 22, T. 6 S., R. 11 E.

E half of S E quarter of N W quarter, Sec. 22, T. 6 S., R. 11 E.

Cemetery:

N W quarter of S E quarter of S E quarter of N E quarter, Sec. 22, T. 6 S., R. 11 E.

S W quarter of N E quarter of S E quarter, Sec. 22, T. 6 S., R. 11 E.

215 acres.

BLUEJACKET.

W half of W half of N E quarter of S E quarter of Sec. 20, T. 27 N., R. 21 E.

W half of E half of W half of N E quarter of S E quarter, Sec. 20, T. 27 N., R. 21 E.

S half of S E quarter of N E quarter of S E quarter, Sec. 20, T. 27 N., R. 21 E.

E half of S E quarter of S W quarter of N E quarter of S E quarter, Sec. 20, T. 27 N., R. 21 E.

E half of E half of N W quarter of S E quarter, Sec. 20, T. 27 N., R. 21 E.

E half of E half of S W quarter of S E quarter, Sec. 20, T. 27 N., R. 21 E.

S E quarter of S E quarter, Sec. 20, T. 27 N., R. 21 E.

S half of S W quarter of S W quarter of S W quarter, Sec. 21, T. 27 N., R. 21 E.

W half of N W quarter of N W quarter, Sec. 28, T. 27 N., R. 21 E.

W half of N E quarter of S E quarter of N E quarter, Sec. 29, T. 27 N., R. 21 E.

S E quarter of S W quarter of N W quarter of N E quarter, Sec. 29, T. 27 N., R. 21 E.

S W quarter of S E quarter of N W quarter of N E quarter, Sec. 29, T. 27 N., R. 21 E.

E half of E half of N W quarter of N E quarter, Sec. 29, T. 27 N., R. 21 E.

N E quarter of N E quarter, Sec. 29, T. 27 N., R. 21 E.

E half of N E quarter of S W quarter of N E quarter, Sec. 29, T. 27 N., R. 21 E.

N W quarter of S E quarter of N E quarter, Sec. 29, T. 27 N., R. 21 E.

Park:

W half of N E quarter of S W quarter of N E quarter, Sec. 29, T. 27 N., R. 21 E.

E half of N W quarter of S W quarter of N E quarter, Sec. 29, T. 27 N., R. 21 E.

Cemetery:

S half of S E quarter of N E quarter of S E quarter, Sec. 28, T. 27 N., R. 21 E.

196.25 acres.

BOWER.

W half of S E quarter of N E quarter of N W quarter of Sec. 28, T. 9 N., R. 17 E.

E half of S W quarter of N E quarter of N W quarter, Sec. 28, T. 9 N., R. 17 E.

E half of N W quarter of S E quarter of N W quarter, Sec. 28, T. 9 N., R. 17 E.

W half of N E quarter of S E quarter of N W quarter, Sec. 28, T. 9 N., R. 17 E.

20 acres.

BOGGY DEPOT.

S W quarter of N E quarter of Sec. 13, T. 3 S., R. 9 E. 40 acres.

BRIARTOWN.

S W quarter of N E quarter of lot 2, Sec. 31, T. 10 N., R. 20 E.

S half of N W quarter of lot 2, Sec. 31, T. 10 N., R. 20 E.

S W quarter of lot 2, Sec. 31, T. 10 N., R. 20 E.

W half of S E quarter of lot 2, Sec. 31, T. 10 N., R. 20 E.

S E quarter of N E quarter of S E quarter of N E quarter, Sec. 36, T. 10 N., R. 19 E.

E half of S E quarter of S E quarter of N E quarter, Sec. 36, T. 10 N., R. 19 E.

30.22 acres.

BRAGGS.

S half of N W quarter of N W quarter of N W quarter of Sec. 28, T. 14 N., R. 20 E.

S W quarter of N W quarter of N W quarter, Sec. 28, T. 14 N., R. 20 E.

S half of S E quarter of N W quarter of N W quarter, Sec. 28, T. 14 N., R. 20 E.

N W quarter of S W quarter of N W quarter, Sec. 28, T. 14 N., R. 20 E.

N E quarter of S W quarter of N W quarter, Sec. 28, T. 14 N., R. 20 E.

S W quarter of S W quarter of N W quarter, Sec. 28, T. 14 N., R. 20 E.

S half of N W quarter of N E quarter of N E quarter, Sec. 29, T. 14 N., R. 20 E.

N half of S W quarter of N E quarter of N E quarter, Sec. 29, T. 14 N., R. 20 E.

S half of N E quarter of N E quarter of N E quarter, Sec. 29, T. 14 N., R. 20 E.

S E quarter of N E quarter of N E quarter, Sec. 29, T. 14 N., R. 20 E.

N E quarter of S E quarter of N E quarter, Sec. 29, T. 14 N., R. 20 E.

S E quarter of S E quarter of N E quarter, Sec. 29, T. 14 N., R. 20 E.

All that part of the S half of S W quarter of N E quarter of N E quarter lying north of the south line of the K. & A. V. Ry.

95.54 acres.

BEE.

N half of N E quarter of N E quarter of N E quarter of Sec. 16, T. 5 S., R. 7 E.

N W quarter of N W quarter of N W quarter, Sec. 15, T. 5 S., R. 7 E.

W half of N E quarter of N W quarter of N W quarter, Sec. 15, T. 5 S., R. 7 E.

N W quarter of S W quarter of N W quarter of N W quarter, Sec. 15, T. 5 S., R 7 E.

22.5 acres.

BENNINGTON.

S half of S W quarter of Sec. 27, T. 6 S., R. 12 E.

S half of N half of S W quarter, Sec. 27, T. 6 S., R. 12 E.

S half of N half of N half of S W quarter, Sec. 27, T. 6 S., R. 12 E.

Cemetery: . .

N E quarter of N W quarter of N W quarter of S E quarter, Sec. 27, T. 6 S., R. 12 E.

N W quarter of N E quarter of N W quarter of S E quarter, Sec. 27, T. 6 S., R. 12 E.

145 acres.

BENNETT.

N half of N E quarter of S E quarter of N E quarter of Sec. 31, T. 12 N., R. 19 E.

S half of S E quarter of N E quarter of N E quarter, Sec. 31, T. 12 N., R. 19 E.

10 acres.

BROOKEN.

S half of N E quarter of N E quarter of S E quarter of Sec. 4, T. 9 N., R. 18 E.

S half of N W quarter of N E quarter of S E quarter, Sec. 4, T. 9 N., R. 18 E.

N W quarter of N W quarter of N E quarter of S E quarter, Sec. 4, T. 9 N., R. 18 E.

E half of N W quarter of S E quarter, Sec. 4, T. 9 N., R. 18 E.

N E quarter of S W quarter of N W quarter of S E quarter, Sec. 4, T. 9 N., R. 18 E.

N half of S W quarter of N E quarter of S E quarter, Sec. 4, T. 9 N., R. 18 E.

40 acres.

BYRNE.

S W quarter of N E quarter of N E quarter of S E quarter of Sec. 26, T. 1 S., R. 8 E.

E half of N E quarter of N E quarter of S E quarter, Sec. 26, T. 1 S., R. 8 E.

W half of S E quarter of N E quarter of S E quarter, Sec. 26, T. 1 S., R. 8 E.

E half of S W quarter of N E quarter of S E quarter, Sec. 26, T. 1 S., R. 8 E.

Part of N E quarter of S E quarter of N E quarter of S E quarter of Com. at N W cor. thereof: S 50 feet, E. 78.4 feet, N 50 feet, W 78.4 feet, Sec. 26, T. 1 S., R 8 E.

17.59 acres.

BIG CABIN.

W 10.99 acres of W 15.99 acres of lot 1, of Sec. 30, T. 24 N., R. 20 E.

N E quarter of N E quarter, Sec. 25, T. 24 N., R. 19 E.

N half of N half of S E quarter of N E quarter, Sec. 25, T. 24 N., R. 19 E.

Cemetery: . .

All laying west of the west line of M., K. & T. R. R. right of way in the S half of S W quarter of N E quarter, Sec. 25, T. 24 N., R. 19 E.

70.15 acres.

CUMBERLAND.

S half of N W quarter of Sec. 5, T. 6 S., R. 7 E.

Lot 3, Sec. 5, T. 6 S., R. 7 E.

Lot 4, Sec. 5, T. 6 S., R. 7 E.

N E quarter of N E quarter of S W quarter, Sec. 5, T. 6 S., R. 7 E.

A tract of 466.69 ft. by 466.69 ft. in the S W corner of S E quarter of S W quarter of S W quarter of Sec. 32, T. 5 S., R. 7 E.

173.98 acres.

CLAREMORE.

S E quarter of N E quarter, Sec. 8, T. 21 N., R. 16 E.

N E quarter of S E quarter, Sec. 8, T. 21 N., R. 16 E.

S E quarter of N W quarter of S E quarter, Sec. 8, T. 21 N., R. 16 E.

N half of N E quarter of S W quarter of S E quarter, Sec. 8, T. 21 N., R. 16 E.

N half of S E quarter of S E quarter, Sec. 8, T. 21 N., R. 16 E.

N half of S half of S E quarter of S E quarter, Sec. 8, T. 21 N., R. 16 E.

S E quarter of S E quarter of S E quarter of S E quarter, Sec. 8, T. 21 N., R. 16 E.

W half, Sec. 9, T. 21 N., R. 16 E.

S half of S W quarter of N W quarter of N E quarter, Sec. 9, T. 21 N., R. 16 E.

S W quarter of N E quarter, Sec. 9, T. 21 N., R. 16 E.

W half of S E quarter of N E quarter, Sec. 9, T. 21 N., R. 16 E.

N W quarter of S E quarter, Sec. 9, T. 21 N., R. 16 E.

W half of N E quarter of S E quarter, Sec. 9, T. 21 N., R. 16 E.

N W quarter of S E quarter of S E quarter, Sec. 9, T. 21 N., R. 16 E.

N half of S W quarter of S E quarter, Sec. 9, T. 21 N., R. 16 E.

S W quarter of S W quarter of S E quarter, Sec. 9, T. 21 N., R. 16 E.

N half of N E quarter of N W quarter, Sec. 16, T. 21 N., R. 16 E.

N E quarter of N W quarter of N W quarter, Sec. 16, T. 21 N., R. 16 E.

Cemetery:

S half of S E quarter of N W quarter of N E quarter, Sec. 16, T. 21 N., R. 16 E.

N E quarter of S W quarter of N E quarter, Sec. 16, T. 21 N., R. 16 E.

657.5 acres.

CROWDER.

E half of S E quarter of N W quarter of Sec. 36, T. 8 N., R. 15 E.

N E quarter of N E quarter of S W quarter, Sec. 36, T. 8 N., R. 15 E.

N half of N half of S E quarter, Sec. 36, T. 8 N., R. 15 E.

S half of S E quarter of N E quarter, Sec. 36, T. 8 N., R. 15 E.

N W quarter of S E quarter of N E quarter, Sec. 36, T. 8 N., R. 15 E.

S W quarter of N E quarter, Sec. 36, T. 8 N., R. 15 E.

S half of N W quarter of N E quarter, Sec. 36, T. 8 N., R. 15 E.

160 acres.

CANEY.

N half of S W quarter of S W quarter of Sec. 1, T. 4 S., R. 10 E.

S E quarter of S W quarter of S W quarter, Sec. 1, T. 4 S., R. 10 E.

N W quarter of S E quarter of S W quarter, Sec. 1, T. 4 S., R. 10 E.

40 acres.

CHECOTAH.

W half of N E quarter of S E quarter of N E quarter, Sec. 32, T. 12 N., R. 17 E.

N W quarter of S E quarter of N E quarter, Sec. 32, T. 12 N., R. 17 E.

S half of S E quarter of N E quarter, Sec. 32, T. 12 N., R. 17 E.

S W quarter of N E quarter, Sec. 32, T. 12 N., R. 17 E.

N half of S E quarter, Sec. 32, T. 12 N., R. 17 E.

N half of S half of S E quarter, Sec. 32, T. 12 N., R. 17 E.

N half of S E quarter of S W quarter of S E quarter, Sec. 32, T. 12 N., R. 17 E.

N half of S half of S E quarter of S E quarter, Sec. 32, T. 12 N., R. 17 E.

S half of S E quarter of S E quarter of S E quarter, Sec. 32, T. 12 N., R. 17 E.

S E quarter of N E quarter of N E quarter of S W quarter, Sec. 32, T. 12 N., R. 17 E.

N E quarter of S E quarter of N E quarter of S W quarter, Sec. 32, T. 12 N., R. 17 E.

W half of S E quarter of N W quarter, Sec. 33, T. 12 N., R. 17 E.

N E quarter of S W quarter of N W quarter, Sec. 33, T. 12 N., R. 17 E.

S half of S W quarter of N W quarter, Sec. 33, T. 12 N., R. 17 E.

N half of S W quarter, Sec. 33, T. 12 N., R. 17 E.

N half of S W quarter of S W quarter, Sec. 33, T. 12 N., R. 17 E.

N half of N half of S E quarter of S W quarter of S W quarter, Sec. 33, T. 12 N., R. 17 E.

S W quarter of S W quarter of S W quarter, Sec. 33, T. 12 N., R. 17 E.

N half of N half of S E quarter of S W quarter, Sec. 33, T. 12 N., R. 17 E.

S W quarter of N W quarter of S E quarter of S W quarter, Sec. 33, T. 12 N., R. 17 E.

N half of N W quarter of S W quarter of S E quarter of S W quarter, Sec. 33, T. 12 N., R. 17 E.

W half of S W quarter of N W quarter of S E quarter, Sec. 33, T. 12 N., R. 17 E.

N W quarter of N W quarter of S W quarter of S E quarter, Sec. 33, T. 12 N., R. 17 E.

S half of S W quarter of S E quarter of S E quarter, Sec. 32, T. 12 N., R. 17 E.

N half of N E quarter, Sec. 32, T. 12 N., R. 17 E.

E half of N E quarter of S E quarter of N E quarter, Sec. 32, T. 12 N., R. 17 E.

N W quarter of S W quarter of N W quarter, Sec. 33, T. 12 N., R. 17 E.

503.75 acres.

CENTRALIA.

S half of N W quarter of N E quarter of Sec. 26, T. 27 N., R. 18 E.

N half of S W quarter of N E quarter, Sec. 26, T. 27 N., R. 18 E.

N half of S E quarter of S W quarter of N E quarter, Sec. 26, T. 27 N., R. 18 E.

S W quarter of S E quarter of S W quarter of N E quarter, Sec. 26, T. 27 N., R. 18 E.

S W quarter of S W quarter of N E quarter, Sec. 26, T. 27 N., R. 18 E.

S half of N half of N E quarter of N W quarter, Sec. 26, T. 27 N., R. 18 E.

S half of N E quarter of N W quarter, Sec. 26, T. 27 N., R. 18 E.

S E quarter of N W quarter, Sec. 26, T. 27 N., R. 18 E.

S E quarter of N E quarter of N W quarter of N W quarter, Sec. 26, T. 27 N., R. 18 E.

S half of N W quarter of N W quarter, Sec. 26, T. 27 N., R. 18 E.

N E quarter of S W quarter of N W quarter, Sec. 26, T. 27 N., R. 18 E.

N E quarter of S E quarter of S W quarter of N W quarter, Sec. 26, T. 27 N., R. 18 E.

N W quarter of S W quarter of N W quarter, Sec. 26, T. 27 N., R. 18 E.

Cemetery:

W half of S E quarter of S E quarter of N E quarter, Sec. 27, T. 27 N., R. 18 E.

177.5 acres.

BLUE.

N half of N half of N W quarter of Sec. 35, T. 6 S., R. 10 E.

S E quarter of S E quarter of S E quarter, Sec. 27, T. 6 S., R. 10 E.

N E quarter of N E quarter of N E quarter, Sec. 34, T. 6 S., R. 10 E.

60 acres.

COWETA.

S E quarter of N E quarter of Sec. 13, T. 17 N., R. 15 E.

N E quarter of S E quarter, Sec. 13, T. 17 N., R. 15 E.

Cemetery:

W half of S W quarter of S W quarter of S E quarter, Sec. 17, T. 17 N., R. 16 E.

85 acres.

CLARKSVILLE.

E half of N W quarter, Sec. 33, T. 16 N., R. 17 E.

N W quarter of N W quarter, Sec. 33, T. 16 N., R. 17 E.

E half of N E quarter of N E quarter, Sec. 32, T. 16 N., R. 17 E.

E half of E half of N W quarter of N E quarter of N E quarter, Sec. 32, T. 16 N., R. 17 E.

Cemetery:

E half of E half of S W quarter of S W quarter of N E quarter, Sec. 32, T. 16 N., R. 17 E.

W half of W half of S E quarter of S W quarter of N E quarter, Sec. 32, T. 16 N., R. 17 E.

147.5 acres.

COLBERT.

26.14 acres out of the W half of W half of S W quarter of Sec. 17.

77.52 acres out of the E half of S E quarter of Sec. 18.

9.76 acres out of the N half of N E quarter of N E quarter of Sec. 19.

113.42 acres surveyed into lots, streets and alleys.

13.85 acres out of the W half of W half of S W quarter of Sec. 17.

2.47 acres out of the E half of S E quarter of Sec. 18.

16.32 acres of the right of way of the M., K. & T. Ry. Co. within the towniste of Colbert, all in T. 8 S., R. 8 E.

Cemetery:

1.4 acres out of N E quarter of N W quarter;

0.8 acres out of the N W quarter of N E quarter;

1.02 acres out of the S W quarter of N E quarter;

1.78 acres out of the S E quarter of N W quarter; all of Sec. 18, T. 8 S., R. 8 E.

CHOUTEAU.

W half of N W quarter of N E quarter of N W quarter of Sec. 25, T. 20 N., R. 18 E.

S W quarter of N E quarter of N W quarter, Sec. 25, T. 20 N., R. 18 E.

W half of S E quarter of N E quarter of N W quarter, Sec. 25, T. 20 N., R. 18 E.

S half of N W quarter of N W quarter, Sec. 25, T. 20 N., R. 18 E.

S W quarter of N W quarter, Sec. 25, T. 20 N., R. 18 E.

S. E. quarter of N W quarter, Sec. 25, T. 20 N., R. 18 E.

N E quarter of N W quarter of N E quarter of S W quarter, Sec. 25, T. 20 N., R. 18 E.

N W quarter of N E quarter of N E quarter of S W quarter, Sec. 25, T. 20 N., R. 18 E.

Cemetery:

S W quarter of N E quarter of S W quarter of N E quarter of S W quarter, Sec. 24, T. 20 N., R. 18 E.

S E quarter of N W quarter of S W quarter of N E quarter of S W quarter, Sec. 24, T. 20 N., R. 18 E.

W half of S E quarter of S W quarter of N E quarter of S W quarter, Sec. 24, T. 20 N., R. 18 E.

E half of S W quarter of S W quarter of N E quarter of S W quarter, Sec. 24, T. 20 N., R. 18 E.

N W quarter of N E quarter of N W quarter of S E quarter of S W quarter, Sec. 24, T. 20 N., R. 18 E.

N E quarter of N W quarter of N W quarter of S E quarter of S W quarter, Sec. 24, T. 20 N., R. 18 E.

130 acres.

CLIFF.

S half of S E quarter of S E quarter of Sec. 17, T. 6 S., R. 6 E.

W half of N E quarter of S E quarter of S E quarter, Sec. 17, T. 6 S., R. 6 E.

N W quarter of S E quarter of S E quarter, Sec. 17, T. 6 S., R. 6 E.

N half of N E quarter of N E quarter of S W quarter of S E quarter, Sec. 17, T. 6 S., R. 6 E.

S E quarter of S E quarter of N W quarter of S E quarter, Sec. 17, T. 6 S., R. 6 E.

S half of N E quarter of S E quarter of N W quarter of S E quarter, Sec. 17, T. 6 S., R. 6 E.

40 acres.

CHECOTAH.

W half of N E quarter of S E quarter of N E quarter of Sec. 32, T. 12 N., R. 17 E.

N W quarter of S E quarter of N E quarter, Sec. 32, T. 12 N., R. 17 E.

S half of S E quarter of N E quarter, Sec. 32, T. 12 N., R. 17 E.

S W quarter of N E quarter, Sec. 32, T. 12 N., R. 17 E.

N half of S E quarter, Sec. 32, T. 12 N., R. 17 E.

N half of S half of S E quarter, Sec. 32, T. 12 N., R. 17 E.

N half of S E quarter of S W quarter of S E quarter, Sec. 32, T. 12 N., R. 17 E.

N half of S half of S E quarter of S E quarter, Sec. 32, T. 12 N., R. 17 E.

S half of S E quarter of S E quarter of S E quarter, Sec. 32, T. 12 N., R. 17 E.

S E quarter of N E quarter of N E quarter of S W quarter, Sec. 32, T. 12 N., R. 17 E.

N E quarter of S E quarter of N E quarter of S W quarter, Sec. 32, T. 12 N., R. 17 E.

W half of S E quarter of N W quarter, Sec. 33, T. 12 N., R. 17 E.

N E quarter of S W quarter of N W quarter, Sec. 33, T. 12 N., R. 17 E.

S half of S W quarter of N W quarter, Sec. 33, T. 12 N., R. 17 E.

N half of S W quarter, Sec. 33, T. 12 N., R. 17 E.

N half of S W quarter of S W quarter, Sec. 33, T. 12 N., R. 17 E.

N half of N half of S E quarter of S W quarter of S W quarter, Sec. 33, T. 12 N., R. 17 E.

S W quarter of S W quarter of S W quarter, Sec. 33, T. 12 N., R. 17 E.

N half of N half of S E quarter of S W quarter, Sec. 33, T. 12 N., R. 17 E.

S W quarter of N W quarter of S E quarter of S W quarter, Sec. 33, T. 12 N., R. 17 E.

N half of N W quarter of S W quarter of S E quarter of S E quarter of S W quarter, Sec. 33, T. 12 N., R. of S W quarter, Sec. 33, T. 12 N., R. 17 E.

W half of S W quarter of N W quarter of S E quarter, Sec. 33, T. 12 N., R. 17 E.

N W quarter of N W quarter of S W quarter of S E quarter, Sec. 33, T. 12 N., R. 17 E.

S half of S W quarter of S E quarter of S E quarter, Sec. 32, T. 12 N., R. 17 E.

N half of N E quarter, Sec. 32, T. 12 N., R. 17 E.

E half of N E quarter of S E quarter of N E quarter, Sec. 32, T. 12 N., R. 17 E.

N W quarter of S W quarter of N W quarter, Sec. 33, T. 12 N., R. 17 E.

503.75 acres.

COALGATE.

W half of S W quarter of S W quarter of N W quarter of Sec. 24, T. 1 N., R. 10 E.

W three-quarters of W half of S W quarter, Sec. 24, T. 1 N., R. 10 E.

W half of N W quarter, Sec. 25, T. 1 N., R. 10 E.

W half of N W quarter of S W quarter, Sec. 25, T. 1 N., R. 10 E.

N half of N E quarter of N W quarter of S W quarter, Sec. 25, T. 1 N., R. 10 E.

N E quarter of S E quarter of S E quarter, Sec. 26, T. 1 N., R. 10 E.

N E quarter and N half of S E quarter, Sec. 26, T. 1 N., R. 10 E.

E half of N E quarter of S W quarter, Sec. 26, T. 1 N., R. 10 E.

S quarter of S E quarter of S E quarter of N W quarter, Sec. 26, T. 1 N., R. 10 E.

E half of S W quarter, Sec. 23, T. 1 N., R. 10 E.

E half of N W quarter of S W quarter, Sec. 23, T. 1 N., R. 10 E.

S half of S E quarter of S W quarter of N W quarter, Sec. 23, T. 1 N., R. 10 E.

S quarter of S E quarter of N W quarter, Sec. 23, T. 1 N., R. 10 E.

S half of S W quarter of N E quarter, Sec. 23, T. 1 N., R. 10 E.

S three-quarters of N E quarter of S W quarter of N E quarter, Sec. 23, T. 1 N., R. 10 E.

S seven-eighths of S E quarter of N E quarter of Sec. 23, T. 1 N., R. 10 E.

S E quarter of Sec. 23, T. 1 N., R. 10 E.

Cemetery:

N half of N E quarter of N E quarter of N E quarter, Sec. 14, T. 1 N., R. 10 E.

785 acres.

CANADIAN.

S W quarter of S E quarter of Sec. 7, T. 8 N., R. 16 E.

W three-fourths of S E quarter of S E quarter, Sec. 7, T. 8 N., R. 16 E.

S half of N W quarter of S E quarter, Sec. 7, T. 8 N., R. 16 E.

W three-fourths of S half of N E quarter of S E quarter, Sec. 7, T. 8 N., R. 16 E.

E half of N E quarter of S W quarter, Sec. 7, T. 8 N., R. 16 E.

E half of S E quarter of S W quarter, Sec. 7, T. 8 N., R. 16 E.

S three-fourths of W half of S E quarter of S W quarter, Sec. 7, T. 8 N., R. 16 E.

N half of N W quarter of N E quarter, Sec. 18, T. 8 N., R. 16 E.

W three-quarters of N half of N E quarter of N E quarter, Sec. 18, T. 8 N., R. 16 E.

N half of W half of W half of S half of N W quarter of N E quarter, Sec. 18, T. 8 N., R. 16 E.

197.5 acres.

CADDO.

S W quarter of S W quarter of N E quarter of S W quarter, Sec. 9, T. 5 S., R. 10 E.

S E quarter of S E quarter of N W quarter of S W quarter, Sec. 9, T. 5 S., R. 10 E.

N W quarter of S E quarter of S W quarter, Sec. 9, T. 5 S., R. 10 E.

N E quarter of S W quarter of S W quarter, Sec. 9, T. 5 S., R. 10 E.

S half of S W quarter of S E quarter, Sec. 9, T. 5 S., R. 10 E.

S half of S E quarter of S W quarter, Sec. 9, T. 5 S., R. 10 E.

S half of S W quarter of S W quarter, Sec. 9, T. 5 S., R. 10 E.

S E quarter of S E quarter of S E quarter, Sec. 8, T. 5 S., R. 10 E.

W half of N E quarter, Sec. 16, T. 5 S., R. 10 E.

E half of N W quarter, Sec. 16, T. 5 S., R. 10 E.

N W quarter of N W quarter, Sec. 16, T. 5 S., R. 10 E.

E half of N E quarter of N E quarter, Sec. 17, T. 5 S., R. 10 E.

N half of S W quarter of N W quarter, Sec. 16, T. 5 S., R. 10 E.

N E quaretr of S E quarter of N E quarter, Sec. 17, T. 5 S., R. 10 E.

N W quarter of N W quarter of S E quarter, Sec. 16, T. 5 S., R. 10 E.

N E quarter of S W quarter, Sec. 16, T. 5 S., R. 10 E.

W half of S W quarter of S W quarter of S W quarter, Sec. 10, T. 5 S., R. 10 E.

400 acres.

DURANT.

S W quarter of S W quarter of Sec. 28, T. 6 S., R. 9 E.

S half of S E quarter, Sec. 29, T. 6 S., R. 9 E.

S E quarter of S W quarter, Sec. 29, T. 6 S., R. 9 E.

E half of S W quarter of S W quarter, Sec. 29, T. 6 S., R. 9 E.

W half, Sec. 33, T. 6 S., R. 9 E.

All Sec. 32, T. 6 S., R. 9 E.

S half of N E quarter of N E quarter, Sec. 31, T. 6 S., R. 9 E.

S E quarter of N E quarter, Sec. 31, T. 6 S., R. 9 E.

N E quarter of S E quarter, Sec. 31, T. 6 S., R. 9 E.

N quarter of lots 1, 2, 3 and 4, Sec. 5, T. 7 S., R. 9 E.

S half of S E quarter of S W quarter of N E quarter, Sec. 5, T. 7 S., R. 9 E.

W half of S W quarter of S W quarter, Sec. 29, T. 6 S., R. 9 E.

N half of N E quarter of N E quarter, Sec. 31, T. 6 S., R. 9 E.

1,324 acres.

EGO.

S W quarter of N W quarter of S E quarter of S E quarter of Sec. 24, T. 3 S., R. 8 E.

S half of N E quarter of S W quarter of S E quarter, Sec. 24, T. 3 S., R. 8 E.

S E quarter of S W quarter of S E quarter, Sec. 24, T. 3 S., R. 8 E.

S E quarter of S W quarter of S W quarter of S E quarter, Sec. 24, T. 3 S., R. 8 E.

W half of S W quarter of S E quarter of S E quarter, Sec. 24, T. 3 S., R. 8 E.

Cemetery:

W half of S E quarter of S W quarter of N W quarter of S E quarter of N W quarter of Sec. 36, T. 3 S., R. 8 E.

S W quarter of S W quarter of N W quarter of S E quarter of N W quarter, Sec. 36, T. 3 S., R. 8 E.

E half of S E quarter of S E quarter of N E quarter of S W quarter of N W quarter, Sec. 36, T. 3 S., R. 8 E.

E half of N E quarter of N E quarter of S E quarter of S W quarter of N W quarter, Sec. 36, T. 3 S., R. 8 E.

N W quarter of N W quarter of S W quarter of S E quarter of N W quarter, Sec. 36, T. 3 S., R. 8 E.

W half of N E quarter of N W quarter of S W quarter of S E quarter of N W quarter, Sec. 36, T. 3 S., R. 8 E.

27.5 acres.

ENTERPRISE.

W half of S W quarter of N W quarter of Sec. 26, T. 9 N., R. 18 E.

N half of N W quarter of N W quarter of S W quarter, Sec. 26, T. 9 N., R. 18 E.

N half of N E quarter of N E quarter of S E quarter, Sec. 27, T. 9 N., R. 18 E.

E half of S E quarter of N E quarter, Sec. 27, T. 9 N., R. 18 E.

S W quarter of S E quarter of N E quarter, Sec. 27, T. 9 N., R. 18 E.

E three-quarters of N W quarter of S E quarter of N E quarter, Sec. 27, T. 9 N., R. 18 E.

W half of N E quarter of S E quarter, Sec. 27, T. 9 N., R. 18 E.

E half of E half of N W quarter of S E quarter, Sec. 27, T. 9 N., R. 18 E.

E half of S E quarter of S W quarter of N E quarter, Sec. 27, T. 9 N., R. 18 E.

Cemetery:

E half of W half of S W quarter of S E quarter of S W quarter, Sec. 27, T. 9 N., R. 18 E.

W half of E half of S W quarter of S E quarter of S W quarter, Sec. 27, T. 9 N., R. 18 E.

107.5 acres.

EMET.

W half of N E quarter of S W quarter of Sec. 14, T. 4 S., R. 7 E.

S E quarter of N W quarter of S W quarter, Sec. 14, T. 4 S., R. 7 E.

S W quarter of S E quarter, Sec. 14, T. 4 S., R. 7 E.

S E quarter of S W quarter, Sec. 14, T. 4 S., R. 7 E.

N E quarter of S W quarter of S W quarter, Sec. 14, T. 4 S., R. 7 E.

N half of S E quarter of S W quarter of S W quarter, Sec. 14, T. 4 S., R. 7 E.

N half of N W quarter of N E quarter, Sec. 23, T. 4 S., R. 7 E.

N half of N E quarter of N W quarter, Sec. 23, T. 4 S., R. 7 E.

N half of S W quarter of N W quarter of N E quarter, Sec. 23, T. 4 S., R. 7 E.

170 acres.

EUFALA.

N W quarter of N W quarter, Sec. 1, T. 9 N., R. 16 E.

N E quarter of S E quarter, Sec. 2, T. 9 N., R. 16 E.

N half of N half of N W quarter of S E quarter, Sec. 2, T. 9 N., R. 16 E.

N half of N half of N E quarter of S W quarter, Sec. 2, T. 9 N., R. 16 E.

S W quarter of N W quarter of N E quarter of S W quarter, Sec. 2, T. 9 N., R. 16 E.

N E quarter of N W quarter of S W quarter, Sec. 2, T. 9 N., R. 16 E.

S half of N half of N W quarter of N W quarter of S W quarter, Sec. 2, T. 9 N., R. 16 E.

S half of N W quarter of N W quarter of S W quarter, Sec. 2, T 9 N., R. 16 E.

S half of S E quarter of S W quarter of N W quarter, Sec. 2, T. 9 N., R. 16 E.

E half of N W quarter, Sec. 2, T. 9 N., R. 16 E.

N E quarter, Sec. 2, T. 9 N., R. 16 E.

S W quarter of S E quarter, Sec. 35, T. 10 N., R. 16 E.

S three-sixteenths of W three-quarters of N W quarter of S E quarter, Sec. 35, T. 10 N., R. 16 E.

W half of W half of S E quarter of S E quarter, Sec. 35, T. 10 N., R. 16 E.

Cemetery:

N half of N W quarter of S W quarter of N W quarter of S E quarter, Sec. 35, T. 10 N., R. 16 E.

S half of S W quarter of N W quarter of N W quarter of S E quarter, Sec. 35, T. 10 N., R. 16 E.

S E quarter of S E quarter of N E quarter of N E quarter of S W quarter, Sec. 35, T. 10 N., R. 16 E.

N half of S E quarter of N E quarter of S W quarter, Sec. 35, T. 10 N., R. 16 E.

S E quarter of N W quarter of N W quarter of N W quarter, Sec. 12, T. 9 N., R. 16 E.

431.38 acres.

FOLSOM.

S half of S E quarter of N E quarter of N E quarter of Sec. 26, T. 4 S., R. 8 E.

E half of S W quarter of N E quarter of N E quarter, Sec. 26, T. 4 S., R. 8 E.

N E quarter of N W quarter of S E quarter of N E quarter, Sec. 26, T. 4 S., R. 8 E.

N half of N E quarter of S E quarter of N E quarter, Sec. 26, T. 4 S., R. 8 E.

17.5 acres.

FAIRLAND.

E half of E half of N E quarter of S E quarter of Sec. 8, T. 26 N., R. 23 E.

W half of E half of S W quarter of N E quarter, Sec. 9, T. 26 N., R. 23 E.

W half of S W quarter of N E quarter, Sec. 9, T. 26 N., R. 23 E.

S E quarter of N W quarter, Sec. 9, T. 26 N., R. 23 E.

S E quarter of S W quarter of N W quarter, Sec. 9 T. 26 N., R. 23 E.

E half of S W quarter of S W quarter of N W quarter, Sec. 9, T. 26 N., R. 23 E.

N half of S W quarter, Sec. 9, T. 26 N., R. 23 E.

N half of S E quarter of S W quarter, Sec. 9, T. 26 N., R. 23 E.

W half of N W quarter of S E quarter, Sec. 9, T. 26 N., R. 23 E.

N W quarter of S W quarter of S E quarter, Sec. 9, T. 26 N., R. 23 E.

W half of E half of N W quarter of S E quarter, Sec. 9, T. 26 N., R. 23 E.

Cemetery:

S W quarter of N W quarter of S W quarter of S W quarter, Sec. 10, T. 26 N., R. 23 E.

N W quarter of S W quarter of S W quarter of S W quarter, Sec. 10, T. 26 N., R. 23 E.

240 acres.

GOWEN.

N half of S W quarter of N E quarter of S E quarter, Sec. 26, T. 5 N., R. 17 E.

N half of S E quarter of N W quarter of S E quarter, Sec. 26, T. 5 N., R. 17 E.

N E quarter of N W quarter of S E quarter, Sec. 26, T. 5 N., R. 17 E.

N W quarter of N E quarter of S E quarter, Sec. 26, T. 5 N., R. 17 E.

S half of S W quarter of N E quarter, Sec. 26, T. 5 N., R. 17 E.

N E quarter of S W quarter of N E quarter, Sec. 26, T. 5 N., R. 17 E.

S E quarter of N W quarter of N E quarter, Sec. 26, T. 5 N., R. 17 E.

W half of S W quarter of N E quarter of N E quarter, Sec. 26, T. 5 N., R. 17 E.

S half of N E quarter of N W quarter of N E quarter, Sec. 26, T. 5 N., R. 17 E.

S W quarter of N W quarter of N E quarter of N E quarter, Sec. 26, T. 5 N., R. 17 E.

82.5 acres.

GIBSON STATION.

S half of S W quarter of Sec. 12, T. 16 N., R. 18 E.

N half of N W quarter of Sec. 13, T. 16 N., R. 18 E.

160 acres.

HAILEYVILLE.

S W quarter, Sec. 36, T. 5 N., R. 16 E.

S E quarter, Sec. 35, T. 5 N., R. 16 E.

Lots 2, 3 and 4, Sec. 1, T. 4 N., R. 16 E.

S W quarter of N E quarter, Sec. 1, T. 4 N., R. 16 E.

S half of N W quarter, Sec. 1, T. 4 N., R. 16 E.

N half of N W quarter of S E quarter, Sec. 1, T. 4 N., R. 16 E.

N half of N E quarter of S W quarter, Sec. 1, T. 4 N., R. 16 E.

N half of N W quarter of S W quarter, Sec. 1, T. 4 N., R. 16 E.

E half of lot 1, Sec. 2, T. 4 N., R. 16 E.

E half of S E quarter of N E quarter, Sec. 2, T. 4 N., R. 16 E.

N E quarter of N E quarter of S E quarter, Sec. 2, T. 4 N., R. 16 E.

Cemetery:

N half of S E quarter of S W quarter of N E quarter of Sec. 35, T. 5 N., R. 16 E.

681.05 acres.

HARTSHORNE.

S half of N E quarter of Sec. 6, T. 4 N., R. 17 E.

S half of S E quarter of N W quarter, Sec. 6, T. 4 N., R. 17 E.

S half of N half of S E quarter of N W quarter, Sec. 6, T. 4 N., R. 17 E.

S half of lot 5, Sec. 6, T. 4 N., R. 17 E.

S half of N E quarter of lot 5, Sec. 6, T. 4 N., R. 17 E.

N W quarter of lot 5, Sec. 6, T. 4 N., R. 17 E.

W half of lot 4, Sec. 6, T. 4 N., R. 17 E.

Lot 6, Sec. 6, T. 4 N., R. 17 E.

Lot 7, Sec. 6, T. 4 N., R. 17 E.

E half of S W quarter, Sec. 6, T. 4 N., R. 17 E.

S E quarter, Sec. 6, T. 4 N., R. 17 E.

S W quarter of S W quarter, Sec. 5, T. 4 N., R. 17 E.

N W quarter of N W quarter of S W quarter, Sec 5, T. 4 N., R. 17 E.

W half of N E quarter of N W quarter of S W quarter, Sec. 5, T. 4 N., R. 17 E.

S half of N W quarter of S W quarter, Sec. 5, T. 4 N., R. 17 E.

W half of E half of S W quarter of N W quarter, Sec. 5, T. 4 N., R. 17 E.

W half of S W quarter of N W quarter, Sec. 5, T. 4 N., R. 17 E.

N half of N half of N W quarter of N W quarter, Sec. 8, T. 4 N., R. 17 E.

N half of N half of N half of N E quarter of Sec. 7, T. 4 N., R. 17 E.

N half of N half of N E quarter of N W quarter, Sec. 7, T. 4 N., R. 17 E.

N half of N E quarter of lot 1, Sec. 7, T. 4 N., R. 17 E.

W half of lot 1, Sec. 7, T. 4 N., R. 17 E.

N E quarter of N E quarter, Sec. 12, T. 4 N., R. 16 E.

E half of S E quarter, Sec 1, T. 4 N., R. 17 E.

S E quarter of N E quarter, Sec 1, T. 4 N., R. 16 E.

Lot 1, Sec. 1, T. 4 N., R. 16 E.

Cemetery:

S half of S W quarter of S E quarter of N W quarter of Sec. 31, T. 5 N., R. 17 E.

848.11 acres.

HELEN (Kingston).

S E quarter of S W quarter of Sec. 30, T. 6 S., R. 6 E.

Lot 4, Sec. 30, T. 6 S., R. 6 E.

N E quarter of N W quarter, Sec. 31, T. 6 S., R. 6 E.

Lot 1, Sec. 31, T. 6 S., R. 6 E.

156.09 acres.

HUNTER.

N half of N E quarter of S E quarter of Sec. 32, T. 6 S., R. 10 E.

N half of S half of N E quarter of S E quarter, Sec. 32, T. 6 S., R. 10 E.

N W quarter of N W quarter of S W quarter, Sec. 33, T. 6 S., R. 10 E.

N half of S W quarter of N W quarter of S W quarter, Sec. 33, T. 6 S., R. 10 E.

45 acres.

HOYT.

S E quarter of N W quarter of Sec. 9, T. 9 N., R. 19 E.

S half of N E quarter of N W quarter, Sec. 9, T. 9 N., R. 19 E.

S E quarter of N E quarter of N E quarter of N W quarter, Sec. 9, T. 9 N., R. 19 E.

S three-quarters of E half of S W quarter of N W quarter, Sec. 9, T. 9 N., R. 19 E.

N E quarter of N E quarter of S W quarter of N W quarter, Sec. 9, T. 9 N., R. 19 E.

E half of S E quarter of N W quarter of N W quarter, Sec. 9, T. 9 N., R. 19 E.

S half of N E quarter of N W quarter of N W quarter, Sec. 9, T .9 N., R. 19 E.

S W quarter of N W quarter of N W quarter of N E quarter, Sec. 9, T. 9 N., R. 19 E.

Cemetery:

E half of N E quarter of N W quarter of N E quarter of Sec. 9, T. 9 N., R. 19 E.

97.5 acres.

INOLA.

S W quarter of Sec. 4, T. 19 N., R. 17 E.

Cemetery:

W half of S W quarter of S W quarter of N E quarter, Sec. 3, T. 19 N., R. 17 E.

165 acres.

KIOWA.

Beginning at a point 1320 ft. north of the corner of sections 13, 14, 23 and 24, T. 3 N., R. 13 E.; thence N. 89 degrees 55 minutes W. 2638.1 ft.; thence S. 0.1 E.

3960 ft.; thence S. 89 degrees 55 minutes E. 2640 ft.; thence S. 89 degrees 46 minutes E. 1318 ft.; thence N. 0.1 minute W. 3960 ft.; thence N. 89 degrees 46 minutes W. 1318.5 ft. to the point of beginning, containing 360 acres and also described as follows:

S W quarter of S W quarter of Sec. 13.

S half of S E quarter of Sec. 14.

N E quarter of Sec. 23.

W half of N W quarter, Sec. 24, T. 3 N., R. 13 E.

KREBS.

S W quarter of N W quarter of S W quarter of Sec. 3, T. 5 N., R. 15 E.

N half of N W quarter of S W quarter of S W quarter, Sec. 3, T. 5 N., R. 15 E.

W half of S E quarter of N W quarter of S W quarter, Sec. 3, T. 5 N., R. 15 E.

N W quarter of N E quarter of S W quarter of S W quarter, Sec. 3, T. 5 N., R. 15 E.

S half of N half of S half of S W quarter, Sec. 3, T. 5 N., R. 15 E.

S half of S half of S W quarter, Sec. 3, T. 5 N., R. 15 E.

S half of S E quarter of S E quarter, Sec. 4, T. 5 N., R. 15 E.

S half of N half of S E quarter of S E quarter, Sec. 4, T. 5 N., R. 15 E.

S E quarter of S W quarter of S E quarter, Sec. 4, T. 5 N., R. 15 E.

S half of N E quarter of S W quarter of S E quarter, Sec. 4, T. 5 N., R. 15 E.

N W quarter of N W quarter, Sec. 10, T. 5 N., R. 15 E.

N E quarter of N W quarter, Sec. 10, T. 5 N., R. 15 E.

N half of S W quarter of N W quarter, Sec. 10, T. 5 N., R. 15 E.

N half of S E quarter of N W quarter, Sec. 10, T. 5 N., R. 15 E.

E half of N W quarter of N E quarter, Sec. 9, T. 5 N., R. 15 E.

N E quarter of N E quarter, Sec. 9, T. 5 N., R. 15 E.

N E quarter of S W quarter of N E quarter, Sec. 9, T. 5 N., R. 15 E.

N half of S E quarter of N E quarter, Sec. 9, T. 5 N., R. 15 E.

S E quarter of S W quarter of N E quarter, Sec. 9, T. 5 N., R. 15 E.

347.5 acres.

KEMP.

W half of N W quarter of N W quarter of S E quarter, Sec. 15, T. 9 S., R. 9 E.

N E quarter of S W quarter, Sec. 15, T. 9 S., R. 9 E.

E half of N E quarter of N W quarter of S W quarter, Sec. 15, T. 9 S., R. 9 E.

S W quarter of N W quarter of S E quarter, Sec. 15, T. 9 S., R. 9 E.

W half of S W quarter of S E quarter, Sec. 15, T. 9 S., R. 9 E.

E half of S E quarter of S W quarter, Sec. 15, T. 9 S., R. 9 E.

N W quarter of S E quarter of S W quarter, Sec. 15, T. 9 S., R. 9 E.

E half of N E quarter of S W quarter of S W quarter, Sec. 15, T. 9 S., R. 9 E.

Cemetery:

S half of S E quarter of S W quarter of N E quarter, Sec. 15, T. 9 S., R. 9 E.

120 acres.

KETCHUM.

S half of N half of Lot 2, Sec. 2, T. 23 N., R. 21 E.
N half of S half of Lot 2, Sec. 2, T. 23 N., R. 21 E.
20 acres.

LEE.

N E quarter of N W quarter of Sec. 24, T. 14 N., R. 15 E.
E half of S E quarter of S E quarter of S W quarter, Sec. 13, T. 14 N., R. 15 E.
45 acres.

LEHIGH.

W half of N W quarter of Sec. 13, T. 1 S., R. 10 E.
W half of E half of N W quarter, Sec. 13, T. 1 S., R. 10 E.
W half of S W quarter, Sec. 13, T. 1 S., R. 10 E.
W half of E half of S W quarter, Sec. 13, T. 1 S., R. 10 E.
W half of S W quarter of S W quarter, Sec. 12, T. 1 S., R. 10 E.
All of Sec. 14, T. 1 S., R. 10 E.
N half of N W quarter of N W quarter of N E quarter, Sec. 23, T. 1 S., R. 10 E.
S half of S E quarter, Sec. 11, T. 1 S., R. 10 E.
S E quarter of S W quarter, Sec. 11, T. 1 S., R. 10 E.
E half of S W quarter of S W quarter, Sec. 11, T. 1 S., R. 10 E.
Cemetery:
W half of W half of N W quarter of S W quarter of S W quarter, Sec. 11, T. 1 S., R. 10 E.
E half of E half of N E quarter of S E quarter of S E quarter, Sec. 10, T. 1 S., R. 10 E.
1050 acres.

FT. GIBSON.

Lot 6, of Sec. 2, T. 15 N., R. 19 E.

Lot 7, Sec. 2, T. 15 N., R. 19 E.

S E quarter of N E quarter, Sec. 2, T. 15 N., R. 19 E.

E half of S E quarter, Sec. 2, T. 15 N., R. 19 E.

E half of S W quarter of S E quarter, Sec. 2, T. 15 N., R. 19 E.

W half of S W quarter of N W quarter, Sec. 1, T. 15 N., R. 19 E.

W half of N W quarter of S W quarter, Sec. 1, T. 15 N., R. 19 E.

S W quarter of S W quarter, Sec. 1, T. 15 N., R. 19 E.

N W quarter of N W quarter, Sec. 12, T. 15 N., R. 19 E.

N half of S W quarter of N W quarter, Sec. 12, T. 15 N., R. 19 E.

N E quarter of S E quarter of N E quarter, Sec. 11, T. 15 N., R. 19 E.

E half of N E quarter of N E quarter, Sec. 11, T. 15 N., R. 19 E.

E half of N W quarter of N E quarter of N E quarter, Sec. 11, T. 15 N., R. 19 E.

N W quarter of N W quarter of N E quarter of N E quarter, Sec. 11, T. 15 N., R. 19 E.

N half of N E quarter of N W quarter of N E quarter, Sec. 11, T. 15 N., R. 19 E.

W half of S W quarter of S E quarter, Sec. 2, T. 15 N., R. 19 E.

N W quarter of N W quarter of N E quarter, Sec. 11, T. 15 N., R. 19 E.

S half of N E quarter of N W quarter of N E quarter, Sec. 11, T. 15 N., R. 19 E.

N half of S half of N W quarter of N E quarter, Sec. 11, T. 15 N., R. 19 E.

S W quarter of N W quarter of N E quarter of N E quarter, Sec. 11, T. 15 N., R. 19 E.

N half of S W quarter of N E quarter of N E quarter, Sec. 11, T. 15 N., R. 19 E.

S E quarter of S W quarter of N E quarter of N E quarter, Sec. 11, T. 15 N., R. 19 E.

Park:

S E quarter of S W quarter of N W quarter of Sec. 1, T. 15 N., R. 19 E.

S half of N E quarter of S W quarter of N W quarter, Sec. 1, T. 15 N., R. 19 E.

N half of N E quarter of N W quarter of S W quarter, Sec. 1, T. 15 N., R. 19 E.

Cemetery:

W half of N W quarter of N E quarter of N W quarter, Sec. 7, T. 15 N., R. 20 E.

W half of E half of N W quarter of N E quarter of N W quarter, Sec. 7, T. 15 N., R. 20 E.

N W quarter of S W quarter of N E quarter of N W quarter, Sec. 7, T. 15 N., R. 20 E.

W half of N E quarter of S W quarter of N E quarter of N W quarter, Sec. 7, T. 15 N., R. 20 E.

467.65 acres.

McALESTER.

W half of N W quarter of S W quarter of Sec. 29.

N W quarter of S W quarter of S W quarter of Sec. 29.

S E quarter of Sec. 30.

S E quarter of S W quarter of Sec. 30.

S half of N E quarter of S W quarter of Sec. 30.

N E quarter of N E quarter of S W quarter of Sec. 30.

E half of N W quarter of N E quarter of S W quarter of Sec. 30.

S half of Lot 3 of Sec. 30.

Lot 4 of Sec. 30.

Lots 1 and 2 and N half Lot 3 of Sec. 31.

E half of N W quarter of Sec. 31.

N E quarter of Sec. 31.

N half of N half of S E quarter of Sec. 31.

N half of N E quarter of S W quarter of Sec. 31.

S half of S half of N W quarter of N W quarter of Sec. 32.

S W quarter of S W quarter of N E quarter of N W quarter of Sec. 32.

N W quarter of N W quarter of S E quarter of N W quarter of Sec. 32.

N half of N half of S W quarter of N W quarter of Sec. 32.

(All in T. 6 N., R. 15 E.)

S half of S W quarter of S W quarter of S W quarter of Sec. 25, T. 6 N., R. 14 E.

Total area, 759.07 acres.

SOUTH McALESTER.

S half of S W quarter of Sec. 32;

S half of N half of S W quarter of Sec. 32;

W half of W half of S W quarter of S E quarter of Sec. 32;

W half of S W quarter of N W quarter of S E quarter of Sec. 32;

S half of S half of Sec. 31;

S half of N half of S half of Sec. 31;

All in T. 6 N., R. 19 E.

S half of S E quarter of Sec. 36;

S half of N half of S E quarter of Sec. 36;

E half of E half of S E quarter of S W quarter of Sec. 36;

E half of S E quarter of N E quarter of S W quarter of Sec. 36;

All in T. 6 N., R. 14 E.

E half of Sec. 1;
E half of E half of E half of W half of Sec. 1;
All in T. 5 N., R. 14 E.
Section 6;
W half of Sec. 5;
W half of W half of W half of E half of Sec. 5;
N W quarter of Sec. 8;
N half of S W quarter of Sec. 8;
W half of W half of N W quarter of S E quarter of Sec. 8;
W half of W half of W half of N E quarter of Sec. 8;
N half of Sec. 7;
N half of S half of Sec. 7;
All in T. 5 N., R. 15 E.
N E quarter of Sec. 12;
N half of S E quarter of Sec. 12;
E half of E half of N E quarter of S W quarter of Sec. 12;
E half of E half of E half of N W quarter of Sec. 12;
All in T. 5 N., R. 14 E.
Total area, 2897.47 acres.

McLAIN.

S half of S E quarter of S E quarter of S E quarter of Sec. 27;
S E quarter of S W quarter of S E quarter of S E quarter of Sec. 27;
N E quarter of N W quarter of N E quarter of N E quarter of Sec. 34;
N half of N E quarter of N E quarter of N E quarter of Sec. 34;
N half of N W quarter of N W quarter of N W quarter of Sec. 35;
W half of N E quarter of N W quarter of S E quarter of Sec. 27;
All in T. 13 N., R. 19 E.
Total area, 25.00 acres.

MEAD.

S E quarter of S W quarter of Sec. 30;
S half of N E quarter of S W quarter of Sec. 30;
All in T. 6 S., R. 8 E.
Total area, 60.00 acres.

MUSKOGEE.

S W quarter of S W quarter, Sec. 24;
S E quarter of Sec. 23;
S W quarter of Sec. 23;
S E quarter of Sec. 23;
E half of S W quarter of Sec. 22;
E half of N W quarter of Sec. 27;
N E quarter of Sec. 27;
S E quarter of Sec. 27;
N E quarter of S W quarter of Sec. 27;
N W quarter of Sec. 26;
N E quarter of Sec. 26;
S E quarter of Sec. 26;
S W quarter of Sec. 26;
N W quarter of Sec. 25;
All in T. 15 N., R. 18 E.

Part of S W quarter of Sec. 25, T. 15 N., R. 18 E., described as follows: All lying north of the line commencing at the S W corner of said section, thence east on south line of said section 148 ft. to a point on east line on K street, thence northeasterly 424.3 ft. to a point on the east line of K street 410 ft. north or south line of said section, thence east parallel with and 410 ft. north of south line of said section 1234.8 ft. to a point on south line of Okmulgee Ave., thence (deflecting southward 24 degrees 32 minutes) 957.1 ft. to a point on south line of said section, thence east on south line of said section 297 ft. to the S E corner of said quarter section.

Part of N W quarter of N W quarter of Sec. 36, T. 15 N., R. 18 E., described as follows: Commencing at a point on north line of said section 148 ft. east of N W corner thereof, thence west on north line of said section 148 ft. to section corner, thence south on west line of said section 593.5 ft. to the north corner of block 359, thence northeasterly 611.7 ft. to the point of beginning.

N E quarter of Sec. 35;

N W quarter of Sec. 35;

Part of N E quarter of Sec. 34. (All north and east of south bank of Coody Creek);

All in Town 15 N., R. 18 E.

N half of S W quarter of Sec. 19, T. 15 N., R. 19 E.

Total area, 2444.76 acres.

OCONEE.

E half of N E quarter of S W quarter of S W quarter of Sec. 29;

S half of N W quarter of S E quarter of S W quarter of Sec. 29;

E half of S W quarter of S E quarter of S W quarter of Sec. 29;

S W quarter of N E quarter of S E quarter of S W quarter of Sec. 29;

N W quarter of S E quarter of S E quarter of S W quarter of Sec. 29;

All in T. 1 N., R. 9 E.

Total area, 20.00 acres.

PEGGS.

N W quarter of S W quarter of Sec. 32, T. 19 N., R. 21 E.

Total area, 40.00 acres.

PHILLIPS.

All that part of the E half of S W quarter of Sec. 35, T. 1 N., R. 10 E., lying E of E line of right of way M., K. & T. Ry.

S W quarter of S E quarter of Sec. 35, T. 1 N., R. 10 E.

Lots 1, 2 and 3 of Sec. 2;

E half of Lot 4 of Sec. 2;

S W quarter of N E quarter of Sec. 2;

All that part of S E quarter of N W quarter of Sec. 2 lying E of E line of right of way M., K. & T. Ry.;

All in T. 1 S., R. 10 E.

All that part of N half of N half of N E quarter of S W quarter of Sec. 2, T. 1 S., R. 10 E., lying E of E line of right of way M., K. & T. Ry.

N half of N half of N W quarter of S E quarter of Sec. 2, T. 1 S., R. 10 E.

Total area, 337.34 acres.

PLATTER.

S half of S E quarter of N E quarter of N E quarter of Sec. 35;

E half of N E quarter of S E quarter of N E quarter of Sec. 35;

N half of S E quarter of S E quarter of N E quarter of Sec. 35;

S W quarter of S E quarter of S E quarter of N E quarter of Sec. 35;

N W quarter of S W quarter of N W quarter of Sec. 36;

W half of W half of N E quarter of S W quarter of N W quarter of Sec. 36;

N half of S W quarter of S W quarter of N W quarter of Sec. 36;

W half of S E quarter of S W quarter of N W quarter of Sec. 36;

All in T. 7 S., R. 7 E.

Total area, 40.00 acres.

PRYOR CREEK.

S E quarter of S W quarter of Sec. 7;

S E quarter of N E quarter of S W quarter of Sec. 7;

S half of S E quarter of Sec. 7;

S half of N W quarter of S E quarter of Sec. 7;

S W quarter of N E quarter of S E quarter of Sec. 7;

S half of N W quarter of N E quarter of S E quarter of Sec. 7;

N half of N E quarter of Sec. 18;

N half of S W quarter of N E quarter of Sec. 18;

N W quarter of S E quarter of N E quarter of Sec. 18;

N half of S W quarter of S W quarter of N E quarter of Sec. 18;

N E quarter of N W quarter of Sec. 18;

E half of N W quarter of N W quarter of Sec. 18;

N E quarter of S E quarter of N W quarter of Sec. 18;

N half of S E quarter of S E quarter of N W quarter of Sec. 18;

All in T. 21 N., R. 19 E.

Total area, 355.00 acres.

ROBERTA.

S E quarter of S E quarter of S E quarter of Sec. 24;

S half of N E quarter of S E quarter of S E quarter of Sec. 24;

All in T. 7 S., R. 9 E.

Total area, 15.00 acres.

SAVANNA.

W half of N E quarter of S W quarter of Sec. 9;
N half of S E quarter of S W quarter of Sec. 9;
S W quarter of S W quarter of S W quarter of Sec. 9;
N half of S W quarter of S W quarter of Sec. 9;
S half of N W quarter of S W quarter of Sec. 9;
N E quarter of N W quarter of S W quarter of Sec. 9;

All in T. 4 N., R. 14 E.
Total area, 100.00 acres.

SILO.

S W quarter of S W quarter of S E quarter of Sec. 9;
S half of S E quarter of S W quarter of Sec. 9;
W half of N E quarter of Sec. 16;
E half of N W quarter of Sec. 16;

All in T. 6 S., R. 8 E.
Total area, 190.00 acres.

SPAVINAW.

S half of S E quarter of S E quarter of N E quarter of Sec. 15;
N half of N E quarter of N E quarter of S E quarter of Sec. 15;

All in T. 22 N., R. 21 E.
Total area, 10.00 acres.

STERRETT.

The N E quarter; the E half of the S E quarter of the N W quarter; the E half of the N E quarter of the S W quarter; the N half and S E quarter of the S E quarter; the N half and S E quarter of the S W quarter of the S E quarter of Sec. 23; and the N W quarter

of the S W quarter; the W half of the N W quarter and the N W quarter of the N E quarter of the N W quarter of Sec. 24, T. 7 S., R. 8 E. Containing 480 acres more or less.

480.00 acres.

STRINGTOWN.

E half of N W quarter of S W quarter of Sec. 16;

W half of N E quarter of S W quarter of Sec. 16;

W half of E half of N E quarter of S W quarter of Sec. 16;

S half of S E quarter of S W quarter of N W quarter of Sec. 16;

S half of S W quarter of S E quarter of N W quarter of Sec. 16;

S W quarter of S E quarter of S E quarter of N W quarter of Sec. 16;

All in T. 1 S., R. 12 E.

Total area, 62.50 acres.

TEXANNA.

S half of N W quarter of S E quarter of S E quarter of Sec. 7;

S E quarter of N E quarter of S W quarter of S E quarter of Sec. 7;

E half of S E quarter of S W quarter of S E quarter of Sec. 7;

S W quarter of S E quarter of S E quarter of Sec. 7;

N half of N E quarter of N E quarter of Sec. 18;

E half of E half of N W quarter of N E quarter of Sec. 18;

W half of S W quarter of N E quarter of N E quarter of Sec. 18;

N E quarter of S W quarter of N E quarter of N E quarter of Sec. 18;

E half of N E quarter of S W quarter of N E quarter of Sec. 18;

S W quarter of N E quarter of S W quarter of N E quarter of Sec. 18;

N E quarter of S E quarter of S W quarter of N E quarter of Sec. 18;

All in T. 10 N., R. 18 E.

Total area, 70.00 acres.

UTICA.

E half of E half of N E quarter of S W quarter of Sec. 35;

W half of N W quarter of S E quarter of Sec. 35;

W half of E half of N W quarter of S E quarter of Sec. 35;

All in T. 7 S., R. 10 E.

Total area, 40.00 acres.

VINITA.

S half of S E quarter of N E quarter of Sec. 16;

N E quarter of S E quarter of Sec. 16;

S half of S E quarter of Sec. 16;

N half of N E quarter of Sec. 21;

N E quarter of S W quarter of N E quarter of Sec. 21;

N half of S E quarter of N E quarter of Sec. 21;

E half of S W quarter of S E quarter of N E quarter of Sec. 21;

N E quarter of N W quarter of N E quarter of S E quarter of Sec. 21;

S E quarter of S E quarter of N E quarter of Sec. 21;

N half of N E quarter of N E quarter of S E quarter of Sec. 21;

S W quarter of N W quarter of Sec. 15;

W half of W half of W half of S E quarter of N W quarter of Sec. 15;

N W quarter of S W quarter of Sec. 15;

N W quarter of N E quarter of S W quarter of Sec. 15;

S half of N E quarter of N E quarter of S W quarter of Sec. 15;

S half of N E quarter of S W quarter of Sec. 15;

S W quarter of N W quarter of N W quarter of S E quarter of Sec. 15;

S half of N W quarter of S E quarter of Sec. 15;

S W quarter of N E quarter of S E quarter of Sec. 15;

S half of S half of Sec. 15;

N W quarter of N E quarter of N E quarter of S W quarter of Sec. 15;

N W quarter of Sec. 22;

W half of N E quarter of Sec. 22;

N half of N half of N W quarter of S W quarter of Sec. 22;

N W quarter of N E quarter of S W quarter of Sec. 22;

E half of S W quarter of N E quarter of S W quarter of Sec. 22;

E half of N E quarter of S W quarter of Sec. 22;

N W quarter of S E quarter of Sec. 22;

All in T. 25 N., R. 20 E.

Total area, 912.50 acres.

WADE.

S half of S E quarter of S W quarter of N E quarter of Sec. 6;

S half of S half of S E quarter of N E quarter of Sec. 6;

N half of N half of S E quarter of Sec. 6;

Cemetery:

S half of S W quarter of S W quarter of N E quarter of Sec. 6;

All in T. 8 S., R. 12 E.

Total area, 60.00 acres.

WAGONER.

E half of Sec. 9;

Sec. 10;

W half of Sec. 11;

S W quarter of S W quarter of S E quarter of Sec. 11;

S half of N W quarter of S W quarter of S E quarter of Sec. 11;

W quarter of E half of Sec. 14;

W half of Sec. 14;

Sec. 15;

E half of Sec. 16;

A part of the N E quarter of Sec. 11, 5 acres in the N W corner of said quarter section, being 360 ft. wide east and west by 605 ft. north and south;

All in T. 17 N., R. 18 E.

Total area, 2660 acres.

WAPANUCKA.

S half of S W quarter of Sec. 13;

S half of S E quarter of Sec. 14;

N E quarter of Sec. 23;

E half of N E quarter of S E quarter of Sec. 23;

N half of N W quarter of Sec. 24;

All in T. 2 S., R. 8 E.

Total area, 420.00 acres.

WELCH.

S half of S half of N W quarter of S E quarter of Sec. 30;

S half of S half of N E quarter of S E quarter of Sec. 30;

S W quarter of S E quarter of Sec. 30;

S E quarter of S E quarter of Sec. 30;

E half of S E quarter of S E quarter of S W quarter of Sec. 30;

W half of W half of N E quarter of N E quarter of Sec. 31;

E half of N W quarter of N E quarter of Sec. 31;

E half of S W quarter of N W quarter of N E quarter of Sec. 31;

N W quarter of N W quarter of N E quarter of Sec. 31;

E half of N E quarter of N E quarter of N W quarter of Sec. 31;

All in T. 28 N., R. 21 E.

Cemetery:

S half of N W quarter of N W quarter of N E quarter of S E quarter of Sec. 25;

N half of S W quarter of N W quarter of N E quarter of S E quarter of Sec. 25;

S half of N E quarter of N E quarter of N W quarter of S E quarter of Sec. 25;

N half of S E quarter of N E quarter of N W quarter of S E quarter of Sec. 25;

All in T. 28 N., R. 20 E.

Total area, 160.00 acres.

WHITEFIELD.

W half of Lot 4 in the S W quarter of Sec. 18;

W half of Lot 3 in the S W quarter of Sec. 18;

W half of the N E quarter of Lot 3 in the S W quarter of Sec. 18;

S W quarter of Lot 2 in the N W quarter of Sec. 18;

S W quarter of the N E quarter of Lot 2 in the N W quarter of Sec. 18;

W half of the S E quarter of Lot 2 in the N W quarter of Sec. 18;

S half of the N W quarter of Lot 2 in the N W quarter of Sec. 18;

All in T. 9 N., R. 20 E.

E half of the S E quarter of S E quarter of N E quarter of Sec. 13;

S E quarter of N E quarter of S E quarter of N E quarter of Sec. 13;

N half of the N E quarter of N E quarter of S E quarter of Sec. 13;

S half of N half of N E quarter of S E quarter of Sec. 13;

N half of S half of N E quarter of S E quarter of Sec. 13;

All in T. 9 N., R. 19 E.

Total area, 100.57 acres.

WILDCAT.

N W quarter of Sec. 19, T. 12 N., R. 14 E.

Total area, 153.00 acres.

WOODVILLE.

S half of S W quarter of Sec. 24;

N half of N W quarter of Sec. 25;

All in T. 7 S., R. 6 E.

Total area, 160.00 acres.

EXHIBIT 36

HOMESTEAD DEED. (80) .....Roll, No.....

THE CHEROKEE NATION,
INDIAN TERRITORY.

To All to Whom These Presents Shall Come, Greeting:

Whereas, By the Act of Congress approved July 1, 1902 (32 Stat., 716), ratified by the Cherokee Nation August 7, 1902, it was provided that there should be allotted, by the Commission to the Five Civilized Tribes, to each citizen of the Cherokee Nation, land equal in value to one hundred and ten acres of the average allottable lands of the Cherokee Nation, and,

Whereas, It was provided by said Act of Congress that each member of said tribe shall, at the time of the selection of his allotment, designate, or have selected and designated for him, from his allotment, land equal in value to forty acres of the average allottable lands of the Cherokee Nation, as nearly as may be, as a homestead, for which separate certificate shall issue; and,

Whereas, The said Commission to the Five Civilized Tribes has certified that the land hereinafter described has been selected by or on behalf of....., a citizen of said tribe, as a homestead.

Now, Therefore, I, the undersigned, the Principal Chief of the Cherokee Nation, by virtue of the power and authority vested in me by the aforesaid Act of the Congress of the United States, have granted and conveyed, and by these presents do grant and convey unto the said.....all right, title and interest of the Cherokee Nation, and of all other citizens of said Nation, in and to the following described land, viz.:

.....

.....

of the Indian Base and Meridian, in Indian Territory, containing.....acres, more or less, as the case may be, according to the United States survey thereof, subject, however, to the conditions provided by said Act of Congress pertaining to allotted homesteads.

In Witness Whereof, I, the Principal Chief of the Cherokee Nation, have hereunto set my hand and caused the Great Seal of said Nation to be affixed this..... day of....., A. D. 190..

.....

Principal Chief of the Cherokee Nation.

Department of the Interior,

Approved....., 190..

....., Secretary.

By....., Clerk.

CHEROKEE NATION

TO

.....

ALLOTMENT DEED. (77) .....Roll, No.....

THE CHEROKEE NATION,

INDIAN TERRITORY.

To All to Whom These Presents Shall Come, Greeting:

Whereas, By the Act of Congress approved July 1, 1902 (32 Stat., 716), ratified by the Cherokee Nation August 7, 1902, it is provided that there shall be allotted by the Commission to the Five Civilized Tribes, to each citizen of the Cherokee Tribe, land equal in value to one hundred and ten acres of the average allottable lands of the Cherokee Nation, and,

Whereas, It was provided by said Act of Congress that each citizen shall designate or have designated and selected for him, at the time of his selection of allotment, out of his allotment, as a homestead, land equal in value to forty acres of the average allottable lands of the Cherokee Nation, as nearly as may be, for which he shall receive a separate certificate, and,

Whereas, The said Commission to the Five Civilized Tribes has certified that the land hereinafter described has been selected by or on behalf of....., a citizen of said Tribe, as an allotment, exclusive of land equal in value to forty acres of the average allottable lands of the Cherokee Nation, selected as a homestead as aforesaid,

Now, Therefore, I, the undersigned Principal Chief of the Cherokee Nation, by virtue of the power and authority vested in me by aforesaid Act of the Congress of the United States, have granted and conveyed, and by these presents do grant and convey unto the said

.....

.....all right, title and interest of the Cherokee Nation, and of all other citizens of said Nation, in and to the following described land, viz:

.....

.....

of the Indian Base and Meridian in Indian Territory, containing.....acres, more or less, as the case may be, according to the United States survey thereof, subject, however, to all the provisions of said Act of Congress.

In Witness Whereof, I, the Principal Chief of the Cherokee Nation, have hereunto set my hand and caused the Great Seal of said Nation to be affixed this..... day of....., A. D. 190..

.....

Principal Chief of the Cherokee Nation.

Department of the Interior,

Approved....., 190..

....., Secretary.

By....., Clerk.

EXHIBIT 37

THE MUSKOGEE (CREEK) NATION,
INDIAN TERRITORY.

To All Whom These Presents Shall Come, Greeting:

Whereas, By the Act of Congress, approved March 1, 1901 (31 Stat., 861), agreement ratified by the Creek Nation May 25, 1901, it was provided that all lands of the Muskogee (Creek) Tribe of Indians, in Indian Territory, except as therein provided, should be allotted among the citizens of said tribe by the United States Commission to the Five Civilized Tribes, so as to give to each an equal share of the whole in value, as nearly as may be, and,

Whereas, It was provided by said Act of Congress that each citizen shall select, or have selected for him, from his allotment, forty acres of land as a homestead, for which he shall have a separate deed, and

Whereas, The said Commission to the Five Civilized Tribes has certified that the land hereinafter described has been selected by or on behalf of....., a citizen of said tribe, as a homestead,

Now, Therefore, I, the undersigned, the Principal Chief of the Muskogee (Creek) Nation, by virtue of the power and authority vested in me by the aforesaid act of the Congress of the United States, have granted and conveyed and by these presents do grant and convey unto the said.....all right, title and interest of the Muskogee (Creek) Nation, and of all other citizens of said Nation in and to the following described land, viz: .....

.....

of the Indian Base and Meridian, in Indian Territory,

containing.....acres, more or less, as the case may be, according to the United States survey thereof, subject, however, to the conditions provided by said Act of Congress, and which conditions are that said land shall be non-taxable and inalienable and free from any incumbrance whatever for twenty-one years; and subject, also, to provisions of said Act of Congress relating to the use, devise and descent of said land after the death of the said....., and subject, also, to all provisions of said Act of Congress relating to appraisement and valuation, and to the provisions of the Act of Congress approved June 30, 1902 (Public No. 200).

In Witness Whereof, I, the Principal Chief of the Muskogee (Creek) Nation, have hereunto set my hand and caused the Great Seal of said Nation to be affixed this.....day of....., A. D. 190..

.....

Principal Chief
of the Muskogee (Creek) Nation.

Department of the Interior,

Approved....., 190..

....., Secretary.

ALLOTMENT DEED. ....Roll, No.....

THE MUSKOGEE (CREEK) NATION,
INDIAN TERRITORY.

To All Whom These Presents Shall Come, Greeting:

Whereas, By the Act of Congress approved March 1, 1901 (31 Stat., 861), agreement ratified by the Creek Nation May 25, 1901, it was provided that all lands of the Muskogee (Creek) Tribe of Indians, in Indian Territory, except as therein provided, should be allotted among the citizens of said tribe by the United States Commission to the Five Civilized Tribes so as to give to each an equal share of the whole in value, as nearly as may be, and,

Whereas, It was provided by said Act of Congress that each citizen shall select, or have selected for him, from his allotment, forty acres of land as a homestead, for which he shall have a separate deed, and,

Whereas, The said Commission to the Five Civilized Tribes has certified that the land hereinafter described has been selected by or on behalf of....., a citizen of said tribe, as an allotment, exclusive of a forty-acre homestead, as aforesaid;

Now, Therefore, I, the undersigned, Principal Chief of the Muskogee (Creek) Nation, by virtue of the power and authority vested in me by the aforesaid Act of the Congress of the United States, have granted and conveyed and by these presents do grant and convey unto the said.....all right, title and interest of the Muskogee (Creek) Nation, and of all other citizens of said Nation, in and to the following described land, viz: .....

.....

of the Indian Base and Meridian, in Indian Territory,

containing.....acres, more or less, as the case may be, according to the United States survey thereof, subject, however, to all provisions of said Act of Congress relating to appraisement and valuation, and to the provisions of the Act of Congress approved June 30, 1902 (Public No. 200).

In Witness Whereof, I, the Principal Chief of the Muskogee (Creek) Nation, have hereunto set my hand and caused the Geat Seal of said Nation to be affixed this.....day of....., A. D. 190..

.....
Principal Chief
of the Muskogee (Creek) Nation.

Department of the Interior,

Approved....., 190..
....., Secretary.

HOMESTEAD DEED TO HEIRS. .....Roll, No.....

THE MUSKOGEE (CREEK) NATION,
INDIAN TERRITORY.

To All Whom These Presents Shall Come, Greeting:

Whereas, By the Act of Congress approved March 1, 1901 (31 Stat., 861), agreement ratified by the Creek Nation May 25, 1901, it was provided that all lands of the Muskogee (Creek) Tribe of Indians, in Indian Territory, except as therein provided, should be allotted among the citizens of said tribe by the United States Commission to the Five Civilized Tribes, so as to give each an equal share of the whole in value, as nearly as may be; and,

Whereas, It was provided by said Act of Congress that each citizen shall select, or have selected for him, from his allotment of forty acres of land as a homestead for which he shall have a separate deed; and,

Whereas, It was provided by the Act of Congress approved June 30, 1902 (32 Stat., 500), that the homestead of each citizen shall descend to his heirs or be disposed of as therein provided; and,

Whereas, The Commission to the Five Civilized Tribes has found that....., a citizen of said tribe, is now dead, and said Commission has certified that the land hereinafter described has been selected as a homestead for said....., and that said land has been allotted to the heirs of said.....;

Now, Therefore, I, the undersigned, the Principal Chief of the Muskogee (Creek) Nation, by virtue of the power and authority vested in me by the aforesaid Acts of the Congress of the United States, have granted and

conveyed, and by these presents do grant and convey, unto the heirs of the said ....., deceased, all right, title, and interest of the Muskogee (Creek) Nation and of all other citizens of said nation in and to the following described land, viz:

.....

.....

of the Indian Base and Meridian, in Indian Territory, containing.....acres, more or less, as the case may be, according to the United States survey thereof, subject, however, to the provisions of said Acts of Congress.

In Witness Whereof, I, the Principal Chief of the Muskogee (Creek) Nation, have hereunto set my hand and caused the Great Seal of said nation to be affixed this.....day of....., A. D. 190..

.....

Principal Chief
of the Muskogee (Creek) Nation.

Department of the Interior,

Approved....., 190..

....., Secretary.

By....., Clerk.

ALLOTMENT DEED TO HEIRS. .....Roll, No.....

THE MUSKOGEE (CREEK) NATION,
INDIAN TERRITORY.

To All Whom These Presents Shall Come, Greeting:

Whereas, By the Act of Congress approved March 1, 1901 (31 Stat., 861), agreement ratified by the Creek Nation May 25, 1901, it was provided that all lands of the Muskogee (Creek) Tribe of Indians, in Indian Territory, except as therein provided, should be allotted among the citizens of said tribe by the United States Commission to the Five Civilized Tribes, so as to give to each an equal share of the whole in value, as nearly as may be; and,

Whereas, It was provided by said Act of Congress that if a citizen of said tribe has died before receiving his allotment of lands, the lands to which he would be entitled, if living, shall descend to his heirs and be allotted and distributed to them; and,

Whereas, The Commission to the Five Civilized Tribes has found that....., a citizen of said tribe, is now dead, and said Commission has certified that the land hereinafter described has been allotted to the heirs of the said.....

Now, Therefore, I, the undersigned, the Principal Chief of the Muskogee (Creek) Nation, by virtue of the power and authority vested in me by the aforesaid Act of Congress of the United States, have granted and conveyed, and by these presents do grant and convey, unto the said heirs of....., deceased, all right, title, and interest of the Muskogee (Creek) Nation and of all other citizens of said nation in and to the following described land, viz: .....
.....

of the Indian Base and Meridian, in Indian Territory, containing.....acres, more or less, as the case may be, according to the United States survey thereof, subject, however, to the provisions of said Act of Congress and to the provisions of the Act of Congress approved June 30, 1902 (32 Stat., 500).

In Witness Whereof, I, the Principal Chief of the Muskogee (Creek) Nation, have hereunto set my hand and caused the Great Seal of said nation to be affixed this.....day of....., A. D. 190..

.....

Principal Chief
of the Muskogee (Creek) Nation.

Department of the Interior,

Approved....., 190..
....., Secretary.
By....., Clerk.

EXHIBIT 38

HOMESTEAD PATENT. Choctaw by Blood Roll No. ....

No..... Date of Certificate.....

THE CHOCTAW AND CHICKASAW NATIONS,
INDIAN TERRITORY.

To All to Whom These Presents Shall Come, Greeting:

Whereas, By the Act of Congress approved July 1, 1902 (32 Stat., 641), and ratified by the citizens of the Choctaw and Chickasaw Nations September 25, 1902, it was provided that there should be allotted, by the Commission to the Five Civilized Tribes, to each citizen of the Choctaw and Chickasaw Nations, land equal in value to three hundred and twenty acres of the average allottable lands of the Choctaw and Chickasaw Nations: and,

Whereas, It was provided by said Act of Congress that each member of said tribes shall, at the time of the selection of his allotment, designate, or have selected and designated for him, from his allotment, land equal in value to one hundred and sixty acres of the average allottable land of the Choctaw and Chickasaw Nations, as nearly as may be, as a homestead, for which separate certificate and patent shall issue; and,

Whereas, The said Commission to the Five Civilized Tribes has certified that the land hereinafter described has been selected by or on behalf of....., a citizen of the.....Nation, as a homestead:

Now, Therefore, We, the undersigned, the Principal Chief of the Choctaw Nation and the Governor of the Chickasaw Nation, by virtue of the power and authority vested in us by the twenty-ninth section of the Act of Congress of the United States, approved June 28,

1898 (30 Stat., 495), have granted and conveyed, and by these presents do grant and convey, unto the said .....all right, title, and interest of the Choctaw and Chickasaw Nations and of all other citizens of said Nations, in and to the following described land, viz: .....

.....

of the Indian Base and Meridian, in Indian Territory, containing.....acres, more or less, as the case may be, according to the United States survey thereof, subject, however, to the conditions provided by the Act of Congress approved July 1, 1902 (32 Stat., 641), pertaining to allotted homesteads.

In Witness Whereof, We, the Principal Chief of the Choctaw Nation and the Governor of the Chickasaw Nation, have hereunto set our hands and caused the great seal of our respective Nations to be affixed at the dates hereinafter shown.

Date,....., 190..

.....

Principal Chief of the Choctaw Nation.

Date,....., 190..

.....

Governor of the Chickasaw Nation.

Department of the Interior,

Approved....., 190..

....., Secretary.

By....., Clerk.

ALLOTMENT PATENT. Choctaw By Blood Roll, No. ..

No..... Date of Certificate.....

THE CHOCTAW AND CHICKASAW NATIONS,
INDIAN TERRITORY.

To All to Whom These Presents Shall Come, Greeting:

Whereas, By the Act of Congress approved July 1, 1902 (32 Stat., 641), and ratified by the citizens of the Choctaw and Chickasaw Nations September 25, 1902, it was provided that there should be allotted, by the Commission to the Five Civilized Tribes, to each citizen of the Choctaw and Chickasaw Nations land equal in value to three hundred and twenty acres of the average allottable lands of the Choctaw and Chickasaw Nations; and,

Whereas, It was provided by said Act of Congress that each member of said tribes shall, at the time of the selection of his allotment, designate, or have selected and designated for him, from his allotment, land equal in value to one hundred and sixty acres of the average allottable land of the Choctaw and Chickasaw Nations, as nearly as may be, as a homestead, for which separate certificate and patent shall issue; and,

Whereas, The said Commission to the Five Civilized Tribes, or its lawful successor, has certified that the land hereinafter described has been selected by or on behalf of....., a citizen of the .....Nation, as an allotment, exclusive of land equal in value to one hundred and sixty acres of the average allottable lands of the Choctaw and Chickasaw Nations selected as a homestead as aforesaid:

Now, Therefore, We, the undersigned, the Principal Chief of the Choctaw Nation and the Governor of the Chickasaw Nation, by virtue of the power and author-

ity vested in us by the twenty-ninth section of the Act of Congress of the United States, approved June 28, 1898 (30 Stat., 405), have granted and conveyed, and by these presents do grant and convey, unto the said .....all right, title, and interest of the Choctaw and Chickasaw Nations and of all other citizens of said Nations, in and to the following described land, viz: ..... of the Indian Base and Meridian, in Indian Territory, containing.....acres, more or less, as the case may be, according to the United States survey thereof, subject, however, to the provisions of the Act of Congress approved July 1, 1902 (32 Stat., 641).

In Witness Whereof, We, the Principal Chief of the Choctaw Nation and the Governor of the Chickasaw Nation, have hereunto set our hands and caused the great seal of our respective Nations to be affixed at the dates hereinafter shown.

Date,....., 190..

(SEAL) .....

Principal Chief of the Choctaw Nation.

Date,....., 190..

(SEAL) .....

Governor of the Chickasaw Nation.

Department of the Interior,

Approved....., 190..

....., Secretary.

By....., Clerk.

EXHIBIT 39

THE CHEROKEE NATION,
INDIAN TERRITORY.

To All to Whom These Presents Shall Come, Greeting:

Whereas, A townsite commission, heretofore appointed under the Act of Congress approved May 31, 1900 (31 Stats., 221), and acting under authority of the Act of Congress approved July 1, 1902 (32 Stats., 716), ratified by the Cherokee Nation August 7, 1902, has appraised the lots in the town of....., Cherokee Nation, Indian Territory; and

Whereas, The plat of said town was approved by the Secretary of the Interior on the.....day of....., and was duly placed on file; and

Whereas, Said commission has appraised all of the town lots included in said plat at their true value, excluding improvements, which appraisal has been approved by the Secretary of the Interior; and

Whereas, The said Commission has awarded the real estate described hereinbelow to....., who has paid.....dollars, the full amount of the purchase price, into the treasury of the United States, to the credit of the Cherokee Nation of Indians, with the United States Indian Agent, at Muskogee, Indian Territory, and is, therefore, entitled to a patent;

Now, Therefore, I, the undersigned, the Principal Chief of the Cherokee Nation, do, by virtue of the power and authority vested in me by the aforesaid Act of the Congress of the United States, hereby grant, sell and convey unto the said....., heirs and assigns forever, all the right, title and interest of the Cherokee Nation, aforesaid, in and to the

.....of Lot..numbered....., in Block numbered....., more fully described as follows:
.....
in the Town of....., Cherokee Nation, Indian Territory, and according to the plat thereof on file as aforesaid.

In Witness Whereof, I, the Principal Chief of the Cherokee Nation, have hereunto set my hand and caused the Great Seal of said nation to be affixed at the date hereinafter shown.

Date....., 190..

(SEAL) .....
Principal Chief of the Cherokee Nation.

Department of the Interior,

Approved....., 190..

....., Secretary.
By....., Clerk.

EXHIBIT 40

(June 28, 1905.)

THE MUSCOGEE (CREEK) NATION,
INDIAN TERRITORY.

To All to Whom These Presents Shall Come, Greeting:

Whereas, a townsite commission, heretofore appointed and acting under the authority of the act of Congress approved March 1, 1901 (31 Stat., 861), agreement ratified by the Creek Nation May 25, 1901, has appraised the lots in the town of....., Muskogee (Creek) Nation, Indian Territory; and

Whereas, the plat of said town was approved by the Secretary of the Interior on the.....day of....., and was duly placed on file; and

Whereas, The said commission has appraised all of the town lots included in said plat at their true value, excluding improvements, which appraisal has been approved by the Secretary of the Interior; and

Whereas, The said Commission has awarded the real estate described hereinbelow to....., who has paid.....Dollars, the full amount of the purchase price, into the treasury of the United States, to the credit of the Muskogee or Creek Nation of Indians, with the United States Indian Agent, at Muskogee, Indian Territory, and is, therefore, entitled to a patent;

Now, Therefore, I, the undersigned, the Principal Chief of the Muskogee (Creek) Nation, do, by virtue of the power and authority vested in me by the aforesaid Act of the Congress of the United States, hereby grant, sell, and convey unto said....., heirs and assigns forever, all the right, title, and inter-

est of the Muskogee (Creek) Nation, aforesaid, in and to
.....
.....
in the Town of....., Muskogee (Creek) Nation, Indian Territory, and according to the plat thereof on file as aforesaid.

In Witness Whereof, I, the Principal Chief of the Muskogee (Creek) Nation, have hereunto set my hand and caused the Great Seal of said Nation to be affixed at the date hereinafter shown.

Date....., 190..

(SEAL) .....
Principal Chief
of the Muskogee (Creek) Nation.

Department of the Interior,

Approved....., 190..

....., Secretary.
By....., Clerk.

EXHIBIT 41

THE CHOCTAW AND CHICKASAW NATIONS, INDIAN TERRITORY.

To All to Whom These Presents Come, Greeting:

Whereas, A certain townsite commission, heretofore appointed, and acting in accordance with law, has appraised the lots in the town of....., ...Nation, Indian Territory; and

Whereas, The plat of said town was approved by the Secretary of the Interior on the.....day of....., ..., and was duly placed on file; and

Whereas, The said commission has awarded the real estate described hereinbelow to....., who has deposited.....dollars, the full amount of the purchase price, with the United States Indian Agent at Muskogee, Indian Territory, and is, therefore, entitled to a patent;

Now, Therefore, We, the undersigned, the Principal Chief of the Choctaw Nation and the Governor of the Chickasaw Nation, do, by virtue of the power and authority vested in us by the twenty-ninth section of the act of Congress of the United States, approved June 28, 1898 (30 Stat., 495), hereby grant, sell and convey unto the said..... heirs and assigns forever, all the right, title and interest of the Choctaw and Chickasaw Nations aforesaid in and to lot..numbered..... in block.. numbered ....., in the town of..... Nation, Indian Territory, and according to the plat thereof on file as aforesaid, saving and excepting from this conveyance, however, all coal and asphalt.

In Witness Whereof, We, the Principal Chief of the Choctaw Nation and the Governor of the Chickasaw Nation, have hereunto set our hands and caused the great seal of our respective nations to be affixed at the dates hereinafter shown.

Date....., 190..

(SEAL) .....

Principal Chief of the Choctaw Nation.

Date....., 190..

(SEAL) .....

Governor of the Chickasaw Nation.

INDIAN TERRITORY.

THE CHOCTAW AND CHICKASAW NATIONS.

To All to Whom These Presents Come, Greeting:

Whereas, A certain townsite commission, heretofore appointed, and acting in accordance with law, has appraised the lots in the town of..... Nation, Indian Territory; and

Whereas, The plat of said town was approved by the Secretary of the Interior on the.....day of....., and was duly placed on file; and

Whereas, The said commission has awarded the real estate described hereinbelow to....., who has deposited.....dollars, the full amount of the purchase price with the United States Indian Agent at Muskogee, Indian Territory, and is, therefore, entitled to a patent;

Now, Therefore, We, the undersigned, the Principal Chief of the Choctaw Nation and the Governor of the Chickasaw Nation, do, by virtue of the power and authority vested in us by the twenty-ninth section of the act of Congress of the United States, approved June 28, 1898 (30 Stat., 495), and the act of Conogress of July 1, 1902 (32 Stat., 641), hereby grant, sell and convey unto the said..... heirs and assigns forever, all the right, title and interest of the Choctaw and Chickasaw Nations aforesaid in and to lot..numbered....., in block.. numbered ....., in the town of.....Nation, Indian Territory, and according to the plat thereof on file as aforesaid.

In Witness Whereof, We, the Principal Chief of the Choctaw Nation and the Governor of the Chickasaw Nation, have hereunto set our hands and caused the

great seal of our respective nations to be affixed at the dates hereinafter shown.

Date.....

(SEAL) .....

Principal Chief of the Choctaw Nation.

Date.....

(SEAL) .....

Governor of the Chickasaw Nation.

EXHIBIT 42

AN ACT TO ENABLE THE PEOPLE OF OKLAHOMA AND OF THE INDIAN TERRITORY TO FORM A CONSTITUTION AND STATE GOVERNMENT AND BE ADMITTED INTO THE UNION ON AN EQUAL FOOTING WITH THE ORIGINAL STATES; AND TO ENABLE THE PEOPLE OF NEW MEXICO AND OF ARIZONA TO FORM A CONSTITUTION AND STATE UNION ON AN EQUAL FOOTING WITH THE ORIGINAL STATES.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the inhabitants of all that part of the area of the United States now constituting the Territory of Oklahoma and the Indian Territory, as at present described, may adopt a constitution and become the State of Oklahoma, as hereinafter provided: *Provided*, That nothing contained in the said constitution shall be construed to limit or impair the rights of person or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this Act had never been passed.

SEC. 2. That all male persons over the age of twenty-one years, who are citizens of the United States, or who are members of any Indian nation or tribe in said Indian Territory and Oklahoma, and who have resided within the limits of said proposed State for at least six months next preceding the election, are hereby authorized to vote for and choose delegates to form a constitutional convention for said proposed State; and all

persons qualified to vote for said delegates shall be eligible to serve as delegates; and the delegates to form such convention shall be one hundred and twelve in number, fifty-five of whom shall be elected by the people of the Territory of Oklahoma, and fifty-five by the people of the Indian Territory, and two shall be elected by the electors residing in the Osage Indian Reservation in the Territory of Oklahoma; and the governor, the chief justice, and the secretary of the Territory of Oklahoma shall apportion the Territory of Oklahoma into fifty-six districts, as nearly equal in population as may be, except that such apportionment shall include as one district the Osage Indian Reservation, and the governor, the chief justice, and the secretary of the Territory of Oklahoma shall appoint an election commissioner who shall establish voting precincts in said Osage Indian Reservation, and shall appoint the judges for election in said Osage Indian Reservation; and two delegates shall be elected from said Osage district; and the Commissioner to the Five Civilized Tribes, and two judges of the United States courts for the Indian Territory, to be designated by the President, shall constitute a board, which shall apportion the said Indian Territory into fifty-five districts, as nearly equal in population as may be, and one delegate shall be elected from each of said districts; and the governor of said Oklahoma Territory, together with the judge senior in service of the United States courts in Indian Territory, shall, by proclamation in which such apportionment shall be fully specified and announced, order an election of the delegates aforesaid in said proposed State at a time designated by them within six months after the approval of this Act, which proclamation shall be issued at least sixty days prior to the time of holding said election of delegates. The election for delegates in the Tertory of Oklahoma and in said Indian Territory shall be

conducted, the returns made, the result ascertained, and the certificates of all persons elected to such convention issued in the same manner as is prescribed by the laws of the Territory of Oklahoma regulating elections for Delegates to Congress. That the election laws of the Territory of Oklahoma now in force, as far as applicable and not in conflict with this Act, including the penal laws of said Territory of Oklahoma relating to elections and illegal voting, are hereby extended to and put in force in said Indian Territory until the legislature of said proposed State shall otherwise provide, and until all persons offending against said laws in the election aforesaid shall have been dealt with in the manner therein provided. And the United States courts of said Indian Territory shall have the same power to enforce the laws of the Territory of Oklahoma, hereby extended to and put in force in said Territory, as have the courts of the Territory of Oklahoma: *Provided, however*, That said board to apportion districts in Indian Territory shall, for the purpose of said election, appoint an election commissioner for each district who shall distribute all ballots and election supplies to the several precincts in his district, receive the election returns from the judges in precincts, and deliver the same to the canvassing board herein named, establish and define the necessary election precincts, and appoint three judges of election for each precinct, not more than two of whom shall be of the same political party, which judges may appoint the necessary clerk or clerks; that said judges of election, so appointed, shall supervise the election in their respective precincts, and canvass and make due return of the vote cast, to the election commissioner for said district who shall deliver said returns, poll books, and ballots to said board, which shall constitute the ultimate and final canvassing board of said election, and they shall issue certificates of election to all persons

elected to such convention from the various districts of the Indian Territory, and their certificates of election shall be prima facie evidence as to the election of delegates: *Provided further*, That in said Indian Territory and Osage Indian Reservation, nominations for delegate to said constitutional convention may be made by convention, by the Republican, Democratic, and People's Party, or by petition in the manner provided by the laws of the Territory of Oklahoma; and certificates and petitions of nomination in said Indian Territory shall be filed with the districting and canvassing board who shall perform the duties of election commissioner under said law, and shall prepare, print, and distribute all ballots, poll books, and election supplies necessary for the holding of said election under said laws. The capital of said State shall temporarily be at the city of Guthrie, in the present territory of Oklahoma and shall not be changed therefrom previous to Anno Domini nineteen hundred and thirteen, but said capital shall, after said year, be located by the electors of said State at an election to be provided for by the legislature: *Provided, however*, That the legislature of the State, except as shall be necessary for the convenient transaction of the public business of said State at said capital, shall not appropriate any public moneys of the State for the erection of buildings for capitol purposes during such period.

SEC. 3. That the delegates to the convention thus elected shall meet at the seat of government of said Oklahoma Territory on the second Tuesday after their election, excluding the day of election in case such day shall be Tuesday, but they shall not receive compensation for more than sixty days of service, and, after organization, shall declare, on behalf of the people of said proposed State, that they adopt the Constitution of the United States; whereupon the said convention shall, and

is hereby authorized to, form a constitution and State government for said proposed State. The constitution shall be republican in form, and make no distinction in civil or political rights on account of race or color, and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence. And said convention shall provide in said constitution—

First. That perfect toleration of religious sentiment shall be secured, and that no inhabitant of said State shall ever be molested in person or property on account of his or her mode of religious worship, and that polygamous or plural marriages are forever prohibited.

Second. That the manufacture, sale, barter, giving away, or otherwise furnishing, except as hereinafter provided, of intoxicating liquors within those parts of said State now known as the Indian Territory and the Osage Indian Reservation and within any other parts of said State which existed as Indian reservations on the first day of January, nineteen hundred and six, is prohibited for a period of twenty-one years from the date of the admission of said State into the Union, and thereafter until the people of said State shall otherwise provide by amendment of said constitution and proper State legislation. Any person, individual or corporate, who shall manufacture, sell, barter, give away, or otherwise furnish any intoxicating liquor of any kind, including beer, ale, and wine, contrary to the provisions of this section, or who shall, within the above-described portions of said State, advertise for sale or solicit the purchase of any such liquors, or who shall ship or in any way convey such liquors from other parts of said State into the portions hereinbefore described, shall be punished on conviction thereof, by fine not less than fifty dollars and by imprisonment not less than thirty

days for each offense: *Provided,* That the legislature may provide by law for one agency under the supervision of said State in each incorporated town of not less than two thousand population in the portions of said State hereinbefore described; and if there be no incorporated town of two thousand population in any county in said portions of said State, such county shall be entitled to have one such agency, for the sale of such liquors for medicinal purposes; and for the sale, for industrial purposes, of alcohol which shall have been denaturized by some process approved by the United States Commissioner of Internal Revenue; and for the sale of alcohol for scientific purposes to such scientific institutions, universities, and colleges as are authorized to procure the same free of tax under the laws of the United States; and for the sale of such liquors to any apothecary who shall have executed an approved bond, in a sum not less than one thousand dollars, conditioned that none of such liquors shall be used or disposed of for any purpose other than in the compounding of prescriptions or other medicines, the sale of which would not subject him to the payment of the special tax required of liquor dealers by the United States, and the payment of such special tax by any person within the parts of said State hereinabove defined shall constitute prima facie evidence of his intention to violate the provisions of this section. No sale shall be made except upon the sworn statement of the applicant in writing setting forth the purpose for which the liquor is to be used, and no sale shall be made for medicinal purposes except sales to apothecaries as hereinabove provided unless such statement shall be accompanied by a bona fide prescription signed by a regular practicing physician, which prescription shall not be filled more than once. Each sale shall be duly registered, and the register thereof, to-

gether with the affidavits and prescriptions pertaining thereto, shall be open to inspection by any officer or citizen of said State at all times during business hours. Any person who shall knowingly make a false affidavit for the purpose aforesaid shall be deemed guilty of perjury. Any physician who shall prescribe any such liquor, except for treatment of disease which after his own personal diagnosis he shall deem to require such treatment, shall, upon conviction thereof, be punished for each offense by fine of not less than two hundred dollars or by imprisonment for not less than thirty days, or by both such fine and imprisonment; and any person connected with any such agency who shall be convicted of making any sale or other disposition of liquor contrary to these provisions shall be punished by imprisonment for not less than one year and one day. Upon the admission of said State into the Union these provisions shall be immediately enforceable in the courts of said State.

Third. That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian, tribe, or nation; and that until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States. That land belonging to citizens of the United States residing without the limits of said State shall never be taxed at a higher rate than the land belonging to residents thereof; that no taxes shall be imposed by the State on lands or property belonging to or which may hereafter be purchased by the United States or reserved for its use.

Fourth. That the debts and libabilities of said Territory of Oklahoma shall be assumed and paid by said State.

Fifth. That provisions shall be made for the establishment and maintenance of a system of public schools, which shall be open to all the children of said State and free from sectarian control; and said school shall always be conducted in English: *Provided*, That nothing herein shall preclude the teaching of other languages in said public schools: *And provided further*, That this shall not be construed to prevent the establishment and maintenance of separate schools for white and colored children.

Sixth. That said State shall never enact any law restricting or abridging the right of suffrage on account of race, color, or previous condition of servitude.

SEC. 4. That in case a constitution and State government shall be formed in compliance with the provisions of this Act the convention forming the same shall provide by ordinance for submitting said constitution to the people of said proposed State for its ratification or rejection at an election to be held at a time fixed in said ordinance, at which election the qualified voters for said proposed State shall vote directly for or against the proposed constitution, and for or against any provisions separately submitted. The returns of said election shall be made to the secretary of the Territory of Oklahoma, who, with the chief justice thereof and the senior judge of the United States court of appeals for the Indian Territory, shall canvass the same; and if a majority of the legal votes cast on that question shall be for the constitution the governor of Oklahoma Territory and the judge senior in service of the United States court of appeals for the Indian Territory shall certify the result to the President of the United

States, together with the statement of the votes cast thereon, and upon separate articles or propositions and a copy of said constitution, articles, propositions, and ordinances. And if the constitution and government of said proposed State are republican in form, and if the provisions in this Act have been complied with in the formation thereof, it shall be the duty of the President of the United States, within twenty days from the receipt of the certificate of the result of said election and the statement of votes cast thereon and a copy of said constitution, articles, propositions, and ordinances, to issue his proclamation announcing the result of said election; and thereupon the proposed State of Oklahoma shall be deemed admitted by Congress into the Union, under and by virtue of this Act, on an equal footing with the original States. The original of said constitution, articles, propositions, and ordinances, and the election returns, and a copy of the statement of the votes cast at said election, shall be forwarded and turned over by the secretary of the Territory of Oklahoma to the State authorities of said State.

SEC. 5. That the sum of one hundred thousand dollars, or so much thereof as may be necessary, is hereby appropriated, out of any money in the Treasury not otherwise appropriated, for the defraying of the expenses of the elections provided for in this Act, and said convention, and for the payment of the members thereof, under the same rules and regulations and at the same rates as are now provided by law for the payment of the Territorial legislature of the Territory of Oklahoma, and the disbursements of the money appropriated by this section shall be made by the secretary of the Territory of Oklahoma.

SEC. 6. That until the next general census, or until otherwise provided by law, the said State of Oklahoma

shall be entitled to five Representatives in the House of Representatives of the United States, to be elected from the following-described districts, the boundaries of which shall remain the same until the next general census:

That district numbered one shall comprise the counties of Grant, Kay, Garfield, Noble, Pawnee, Kingfisher, Logan, Payne, Lincoln, and the territory comprising the Osage and Kansas Indian reservations.

That district numbered two shall comprise the counties of Oklahoma, Canadian, Blaine, Caddo, Custer, Dewey, Day, Woods, Woodward, and Beaver.

That district numbered three shall (with the exception of that part of recording district numbered twelve, which is in the Cherokee and Creek Nations) comprise all the territory now constituting the Cherokee, Creek, and Seminole nations, and the Indian reservations lying northeast of the Cherokee Nation, within said State.

That district numbered four shall comprise all that territory now constituting the Choctaw Nation, that part of recording district numbered twelve which is in the Cherokee and Creek nations, that part of recording district numbered twenty-five which is in the Chickasaw Nation, and the territory comprising recording districts numbered sixteen, twenty-one, twenty-two, and twenty-six, in the Indian Territory.

That district numbered five shall comprise the counties of Greer, Roger Mills, Kiowa, Washita, Comanche, Cleveland, and Pottawatomie, and the territory comprising recording districts numbered seventeen, eighteen, nineteen, and twenty, in the Chickasaw Nation, Indian Territory.

And the said Representatives, together with the governor and other officers provided for in said constitu-

tion, shall be elected on the same day of the election for the ratification or rejection of the constitution; and until said officers are elected and qualified under the provisions of such constitution and the said State is admitted into the Union, the Territorial officers of Oklahome Territory shall continue to discharge the duties of their respective offices in said Territory.

SEC. 7. That upon the admission of the State into the Union sections numbered sixteen and thirty-six, in every township in Oklahoma Territory, and all indemnity lands heretofore selected in lieu thereof, are hereby granted to the State for the use and benfit of the common schools: *Provided*, That sections sixteen and thirty-six embraced in permanent reservations for national purposes shall not at any time be subject to the grant nor the indemnity provisions of this Act, nor shall any lands embraced in Indian, military, or other reservations of any character, nor shall land owned by Indian tribes or individual members of any tribe be subjected to the grants or to the indemnity provisions of this Act until the reservation shall have been extinguished and such lands be restored to and become a part of the public domain: *Provided*, That there is sufficient untaken public land within said State to cover this grant: *And provided further*, That in case any of the lands herein granted to the State of Oklahoma have heretofore been confirmed to the Territory of Oklahoma for the purposes specified in this Act, the amount so confirmed shall be deducted from the quantity specified in this Act.

There is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of five million dollars for the use and benefit of the common schools of said State in lieu of sections sixteen and thirty-six, and other lands of the Indian Territory.

Said appropriation shall be paid by the Treasurer of the United States at such time and to such person or persons as may be authorized by said State to receive the same under laws to be enacted by said State, and until said State shall enact such laws said appropriation shall not be paid, but said State shall be allowed interest thereon at the rate of three per centum per annum, which shall be paid to said State for the use and benefit of its public schools. Said appropriation of five million dollars shall be held and invested by said State, in trust, for the use and benefit of said schools, and the interest thereon shall be used exclusively in the support and maintenance of said schools: *Provided*, That nothing in this Act contained shall repeal or affect any Act of Congress relating to the Sulphur Springs Reservation as now defined or as may be hereafter defined or extended, or the power of the United States over it or any other lands embraced in the State hereafter set aside by Congress as a national park, game preserve, or for the preservation of objects of archæological or ethnological interest; and nothing contained in this Act shall interefere with the rights and ownership of the United States in any land hereafter set aside by Congress as a national park, game preserve, or other reservation, or in the said Sulphur Springs Reservation, as it now is or may be hereafter defined or extended by law; but exclusive legislation, in all cases whatsoever, shall be exercised by the United States, which shall have exclusive control and jurisdiction over the same; but nothing in this proviso contained shall be construed to prevent the service within said Sulphur Springs Reservation or national parks, game preserves, and other reservations hereafter established by law, of civil and criminal processes lawfully issued by the authority of said State, and said State shall not be entitled to select indemnity school lands

for the thirteenth, sixteenth, thirty-third, and thirty-sixth sections that may be embraced within the metes and bounds of the national park, game preserve, and other reservation or the said Sulphur Springs Reservation, as now defined or may be hereafter defined.

SEC. 8. That section thirteen in the Cherokee Outlet, the Tonkawa Indian Reservation, and the Pawnee Indian Reservation, reserved by the President of the United States by proclamation issued August nineteenth, eighteen hundred and ninety-three, opening to settlement the said lands, and by any Act or Acts of Congress since said date, and section thirteen in all other lands which have been or may be opened to settlement in the Territory of Oklahoma, and all lands heretofore selected in lieu thereof, is hereby reserved and granted to said State for the use and benefit of the University of Oklahoma and the University Preparatory School, one-third; of the normal schools now established or hereafter to be established, one-third; and of the Agricultural and Mechanical College and the Colored Agricultural Normal University, one-third. The said lands or the proceeds thereof as above apportioned shall be divided between the institutions as the legislature of said State may prescribe: *Provided*, That the said lands so reserved or the proceeds of the sale thereof shall be safely kept or invested and held by said State, and the income thereof, rentals, or otherwise, only shall be used exclusively for the benefit of said educational institutions. Such educational institutions shall remain under the exclusive control of said State, and no part of the proceeds arising from the sale or disposal of any lands herein granted for educational purposes, or the income or rentals thereof, shall be used for the support of any religious or sectarian school, college, or university.

That section thirty-three, and all lands heretofore selected in lieu thereof, heretofore reserved under said proclamation, and Acts for charitable and penal institutions and public buildings, shall be apportioned and disposed of as the legislature of said State may prescribe.

Where any part of the lands granted by this Act to the State of Oklahoma are valuable for minerals, which terms shall also include gas and oil, such lands shall not be sold by the said State prior to January first, nineteen hundred and fifteen; but the same may be leased for periods not exceeding five years by the State officers duly authorized for that purpose, such leasing to be made by public competition after not less than thirty days' advertisement in the manner to be prescribed by law, and all such leasing shall be done under sealed bids and awarded to the highest responsible bidder. The leasing shall require and the advertisement shall specify in each case a fixed royalty to be paid by the successful bidder, in addition to any bonus offered for the lease, and all proceeds from leases shall be covered into the fund to which they shall properly belong, and no transfer or assignment of any lease shall be valid or confer any right in the assignee without the consent of the proper State authorities in writing: *Provided, however*, That agricultural lessees in possession of such shall be reimbursed by the mining lessees for all damage done to said agricultural lessees' interest therein by reason of such mining operations. The legislature of the State may prescribe additional legislation governing such leases not in conflict herewith.

SEC. 9. That said sections sixteen and thirty-six, and lands taken in lieu thereof, herein granted for the support of the common schools, if sold, may be appraised and sold at public sale in one hundred and sixty acre

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tracts or less, under such rules and regulations as the legislature of the said State may prescribe, preference right to purchase at the highest bid being given to the lessee at the time of such sale, the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of such schools. But said lands may, under such regulations as the legislature may prescribe, be leased for periods not to exceed ten years; and such lands shall not be subject to homestead entry or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only.

SEC. 10. That said sections thirteen and thirty-three, aforesaid, if sold, may be appraised and sold at public sale, in one hundred and sixty acre tracts or less, under such rules and regulations as the legislature of said State may prescribe, preference right to purchase at the highest bid being given to the lessee at the time of such sale, but such lands may be leased for periods of not more than five years, under such rules and regulations as the legislature shall prescribe, and until such time as the legislature shall prescribe such rules these and all other lands granted to the State shall be leased under existing rules and regulations, and shall not be subject to homestead entry or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for designated purposes only, and until such time as the legislature shall prescribe as aforesaid such lands shall be leased under existing rules: *Provided*, That before any of the said lands shall be sold, as provided in sections nine and ten of this Act, the said lands and the improvements thereon shall be appraised by three disinterested appraisers, who shall be nonresidents of the county wherein the land is situated, to be designated as the legislature of said State shall prescribe, and the said ap-

praisers shall make a true appraisement of said lands at the actual cash value thereof, exclusive of improvements, and shall separately appraise all permanent improvements thereon at their fair and reasonable value, and in case the leaseholder does not become the purchaser, the purchaser at said sale shall, under such rules and regulations as the legislature may prescribe, pay to or for the leaseholder the appraised value of said improvements, and to the State the amount bid for the said lands, exclusive of the appraised value of improvements; and at said sale no bid for any tract at less than the appraisement thereof shall be accepted.

SEC. 11. That an amount equal to five per centum of the proceeds of the sales of public lands lying within said State shall be paid to the said State, to be used as a permanent fund the interest only of which shall be expended for the support of the common schools within said State.

SEC. 12. That in lieu of the grant of land for purposes of internal improvement made to new States by the eighth section of the Act of September fourth, eighteen hundred and forty-one, which section is hereby repealed as to said State, and in lieu of any claim or demand of the State of Oklahoma under the Act of September twenty-eighth, eighteen hundred and fifty, and section twenty-four hundred and seventy-nine of the Revised Statutes, making a grant of swamp and overflowed lands, which grant it is hereby declared is not extended to said State of Oklahoma, the following grant of land is hereby made to said State from public lands of the United States within said State, for the purposes indicated, namely: For the benefit of the Oklahoma University, two hundred and fifty thousand acres; for the benefit of the University Preparatory School, one hundred and fifty thousand acres; for the benefit of the

Agricultural and Mechanical College, two hundred and fifty thousand acres; for the benefit of the Colored Agricultural and Normal University, one hundred thousand acres; for the benefit of normal schools, now established or hereafter to be established, three hundred thousand acres. The lands granted by this section shall be selected by the board for leasing school lands of the Territory of Oklahoma immediately upon the approval of this Act. Said selections as soon as made shall be certified to the Secretary of the Interior, and the lands so selected shall be thereupon withdrawn from homestead entry.

SEC. 13. That said State when admitted as aforesaid shall constitute two judicial districts, to be known as the eastern district of Oklahoma and the western district of Oklahoma; the said Indian Territory shall constitute said eastern district, and the said Oklahoma Territory shall constitute said western district. The circuit and district courts for the eastern district shall be held one term at Muscogee, one term at Vinita, one term at Tulsa, one term at South McAlester, one term at Chickasha, and one term at Ardmore, each year, and the circuit and district courts of the western district shall be held one term at Guthrie, one term at Oklahoma City, and one term at Enid, and one term at Lawton, each year, for the time being. And the said districts shall, for judicial purposes, until otherwise provided, be attached to the eighth judicial circuit. There shall be appointed for each of said districts one district judge, one United States attorney, and one United States marshal. There shall be appointed a clerk for each of said districts, who shall keep his office at Muscogee and Guthrie, respectively, for the time being. The regular term of said courts shall be held at the places designated in this Act, at Muscogee on the first Monday in

January and at Vinita on the first Monday in March and at Tulsa on the first Monday in April; at South McAlester on the first Monday in June; at Ardmore on the first Monday in October; at Chickasha on the first Monday of November; at Guthrie on the first Monday in January; at Oklahoma City on the first Monday in March; at Enid on the first Monday in June, and at Lawton on the first Monday in October, in each year, and one grand jury shall be summoned in each year in each of said circuit and district courts. The circuit and district courts for each of said districts, and the judges thereof, respectively, shall possess the same powers and jurisdiction and perform the same duties required to be performed by the other circuit and district courts and judges of the United States, and shall be governed by the same laws and regulations. The marshal, district attorney, and clerk of each of the circuit and district courts of said districts, and all other officers and persons performing duties in the administration of justice therein, shall severally possess the powers and perform the duties lawfully required to be performed by similar officers in other districts of the United States, and shall, for the services they may perform, receive the fees and compensation now allowed by law to officers performing similar services for the United States in other districts of the United States; and that the laws in force in the Territory of Oklahoma, as far as applicable, shall extend over and apply to said State until changed by the legislature thereof.

SEC. 14. That all prosecutions for crimes or offenses hereafter committed in either of said judicial districts as hereby constituted shall be cognizable within the district in which committed, and all prosecutions for crimes or offenses committed before the passage of this Act in which indictments have not yet been found or

proceedings instituted shall be cognizable within the judicial district as hereby constituted in which such crimes or offenses were committed.

SEC. 15. That all appeals or writs of error taken from the supreme court of Oklahoma Territory, or the United States court of appeals in the Indian Territory to the Supreme Court of the United States or the United States circuit court of appeals for the eighth circuit, previous to the final admission of such State shall be prosecuted to final determination as though this Act had not been passed. And all cases in which final judgment has been rendered in such Territorial appellate courts in which appeals or writs of error might be had except for the admission of such State may still be sued out, taken, and prosecuted to the Supreme Court of the United States or the United States circuit court of appeals under the provisions of existing laws, and there held and determined in like manner, and in either case the Supreme Court of the United States, or the United States circuit court of appeals, in the event of reversal shall remand the said causes to either the State supreme court or other final appellate court of said State, or the United States circuit and district courts of said State, as the case may require: *Provided*, That the time allowed by existing law for appeals and writs of error from appellate courts of said Territories shall not be enlarged hereby, and all appeals and writs of error not sued out from the final judgments of said courts at the time of the admission of such State shall be taken within six months from such time.

SEC. 16. That all causes pending in the supreme and district courts of Oklahoma Territory and in the United States courts and in the United States court of appeals in the Indian Territory arising under the Constitution, laws, or treaties of the United States, or af-

fecting ambassadors, ministers, or consuls of the United States, or of any other country or State, or of admiralty or of maratime jurisdiction, or in which the United States may be a party, or between citizens of the same State claiming lands under grants from different States; and in all cases where there is a controversy between citizens of said Territories prior to admission and citizens of different States, or between citizens of different States, or between a citizen of any State and citizens or subjects of any foreign State or country, and in which cases of diversity of citizenship there shall be more than two thousand dollars in controversy, exclusive of interest and costs, shall be transferred to the proper United States circuit or district court for final disposition: *Provided*, That said transfer shall not be made in any case where the United States is not a party except on application of one of the parties in the court in which the cause is pending, at or before the second term of such court, after the admission of said State, supported by oath, showing that the case is one which may be so transferred, the proceedings to effect such transfer, except as to time and parties, to be the same as are now provided by law for the removal of causes from a State court to a circuit court of the United States; and in causes transferred from the appellate courts of said Territories the circuit court of the United States in such State shall first determine such appellate matters as the successor of and with all the power of said Territorial appellate courts, and shall thereafter proceed under its original jurisdiction of such causes. All final judgments and decrees rendered in such circuit and district courts in such transferred cases may be reviewed by the Supreme Court of the United States or by the United States circuit court of appeals in the same manner as is now provided by law with reference to existing United States circuit and district courts.

SEC. 17. That all cases pending in the supreme court of said Territory of Oklahoma and in the United States court of appeals in the Indian Territory not transferred to the United States circuit and district courts in said State of Oklahoma shall be proceeded with, held, and determined by the supreme or other final appellate court of such State as the successor of said Territorial supreme court and appellate court, subject to the same right to review upon appeal or error to the Supreme Court of the United States now allowed from the supreme or appellate courts of a State under existing laws. Jurisdiction of all cases pending in the courts of original jurisdiction in said Territories not transferred to the United States circuit and district courts shall devolve upon and be exercised by the courts of original jurisdiction created by said State.

SEC. 18. That the supreme court or other court of last resort of said State shall be deemed to be the successor of said Territorial appellate courts and shall take and possess any and all jurisdiction as such, not herein otherwise specifically provided for, and shall receive and retain the custody of all books, dockets, records, and files not transferred to other courts, as herein provided, subject to the duty to furnish transcripts of all book entries in any specific case transferred to complete the record thereof.

SEC. 19. That the courts of original jurisdiction of such State shall be deemed to be the successor of all courts of original jurisdiction of said Territories and as such shall take and retain custody of all records, dockets, journals, and files of such courts except in causes transferred therefrom, as herein provided; the files and papers in such transferred cases shall be transferred to the proper United States Circuit or District court, together with a transcript of all book entries to

complete the record in such particular case so transferred.

SEC. 20. That all cases pending in the district courts of Oklahoma Territory and in the United States courts for the Indian Territory at the time said Territories become a State not transferred to the United States circuit or district courts in the State of Oklahoma shall be proceeded with, held, and determined by the courts of said State, the successors of said district courts of the Territory of Oklahoma and United States courts for the Indian Territory, with the right to prosecute appeals or writs of error to the supreme court of said State, and also with the same right to prosecute appeals or writs of error from the final determination in said causes made by the supreme court of said State of Oklahoma to the Supreme Court of the United States, as now provided by law for appeals and writs of error from the supreme court of a State to the Supreme Court of the United States.

SEC. 21. That the constitutional convention may by ordinance provide for the election of officers for a full State government, including members of the legislature and five Representatives to Congress, and shall constitute the Osage Indian Reservation a separate county, and provide that it shall remain a separate county until the lands in the Osage Indian Reservation are allotted in severalty and until changed by the legislature of Oklahoma, and designate the county seat thereof, and shall provide rules and regulations and define the manner of conducting the first election for officers in said county. Such State government shall remain in abeyance until the State shall be admitted into the Union and the election for State officers held, as provided for in this Act. The State legislature when organized shall elect two Senators of the United States, in the manner

now prescribed by the laws of the United States, and the governor and secretary of said State shall certify the election of the Senators and Representatives in the manner required by law; and said Senators and Representatives shall be entitled to be admitted to seats in Congress and to all the rights and privileges of Senators and Representatives of other States in the Congress of the United States. And the officers of the State government formed in pursuance of said constitution, as provided by said constitutional convention, shall proceed to exercise all the functions of such State officers; and all laws in force in the Territory of Oklahoma at the time of the admission of said State into the Union shall be in force throughout said State, except as modified or changed by this Act or by the constitution of the State, and the laws of the United States not locally inapplicable shall have the same force and effect within said State as elsewhere within the United States.

SEC. 22. That the constitutional convention provided for herein shall, by ordinance irrevocable, accept the terms and conditions of this Act.

EXHIBIT 43

TABULATED LIST OF SECTIONS COVERED BY LAND GRANT, BEING ODD SECTIONS WITHIN TWENTY MILES ON EACH SIDE OF RAILWAY.

TOWNSHIPS.	SECTIONS.
T 29 N, R 17 E	Odd sections 13, 15, 23, 25, 27 and 35.
T 29 N, R 18 E	Odd sections 13-35 inclusive.
T 29 N, R 19 E	Odd sections 13-35 inclusive.
T 29 N, R 20 E	Odd sections 13-35 inclusive.
T 29 N, R 21 E	Odd sections 13-35 inclusive.
T 29 N, R 22 E	Odd sections 13-35 inclusive.
T 29 N, R 23 E	Odd sections 13-35 inclusive.
T 29 N, R 24 E	Odd sections 19, 29 and 31.
T 28 N, R 17 E	Odd sections 1, 11, 13, 23, 25 and 35.
T 28 N, R 18 E	Odd sections 1-35 inclusive.
T 28 N, R 19 E	Odd sections 1-35 inclusive.
T 28 N, R 20 E	Odd sections 1-35 inclusive.
T 28 N, R 21 E	Odd sections 1-35 inclusive. Townsite of Welch occupies part of section 31.
T 28 N, R 22 E	Odd sections 1-35 inclusive.

T 28 N, R 23 E
Odd sections 1-35 inclusive.
T 28 N, R 24 E
Odd sections 5, 7, 9, 17, 19, 21, 29, 31 and 33.
T 27 N, R 17 E
Odd sections 1, 13, 23, 25 and 35.
T 27 N, R 18 E
Odd sections 1-35 inclusive. Townsite of Centralia occupies part of section 25.
T 27 N, R 19 E
Odd sections 1-35 inclusive.
T 27 N, R 20 E
Odd sections 1-35 inclusive.
T 27 N, R 21 E
Odd sections 1-35 inclusive. Townsite of Blue Jacket occupies part of sections 21 and 29.
T 27 N, R 22 E
Odd sections 1-35 inclusive.
T 27 N, R 23 E
Odd sections 1-35 inclusive.
T 27 N, R 24 E
Odd sections 3, 5, 7, 9, 15, 17, 19, 21, 27, 29, 31 and 33.
T 26 N, R 17 E
Odd sections 1, 3, 9, 11, 13, 15, 21, 23, 25, 27, 29, 31, 33 and 35.
T 26 N, R 18 E
Odd sections 1-35 inclusive.
T 26 N, R 19 E
Odd sections 1-35 inclusive.
T 26 N, R 20 E
Odd sections 1-35 inclusive.
T 26 N, R 21 E
Odd sections 1-35 inclusive.
T 26 N, R 22 E
Odd sections 1-35 inclusive. Townsite of Afton occupies part of section 33.

T 26 N, R 23 E

Odd sections 1-35 inclusive. Townsite of Fairland occupies part of section 9.

T 26 N, R 24 E

Odd sections 3, 5, 7, 9, 15, 17, 19, 21, 27, 29, 31 and 33.

T 25 N, R 16 E

Odd sections 1, 13, 23, 25 and 35.

T 25 N, R 17 E

Odd sections 1-35 inclusive.

T 25 N, R 18 E

Odd sections 1-35 inclusive.

T 25 N, R 19 E

Odd sections 1-35 inclusive.

T 25 N, R 20 E

Odd sections 1-35 inclusive. Townsite of Vinita occupies part of sections 15 and 21.

T 25 N, R 21 E

Odd sections 1-35 inclusive.

T 25 N, R 22 E

Odd sections 1-35 inclusive.

T 25 N, R 23 E

Odd sections 1-35 inclusive.

T 25 N, R 24 E

Odd sections 5, 7, 9, 17, 19, 29 and 31.

T 24 N, R 16 E

Odd sections 1, 3, 11, 13, 15, 21, 23, 25, 27, 33 and 35.

T 24 N, R 17 E

Odd sections 1-35 inclusive. Townsite of Chelsea occupies part of section 25.

T 24 N, R 18 E

Odd sections 1-35 inclusive. Townsite of Chelsea occupies part of section 19.

T 24 N, R 19 E

Odd sections 1-35 inclusive. Townsite of Big Cabin occupies part of section 25.

T 24 N, R 20 E
Odd sections 1-35 inclusive.
T 24 N, R 21 E
Odd sections 1-35 inclusive.
T 24 N, R 22 E
Odd sections 1-35 inclusive.
T 24 N, R 23 E
Odd sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 27, 29, 31 and 33.
T 24 N, R 24 E
Odd section 7.
T 23 N, R 16 E
Odd sections 1, 3, 5, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33 and 35.
T 23 N, R 17 E
Odd sections 1-35 inclusive.
T 23 N, R 18 E
Odd sections 1-35 inclusive.
T 23 N, R 19 E
Odd sections 1-35 inclusive. Townsite of Adair occupies part of section 27 and 33.
T 23 N, R 20 E
Odd sections 1-35 inclusive.
T 23 N, R 21 E
Odd sections 1-35 inclusive.
T 23 N, R 22 E
Odd sections 1-35 inclusive.
T 23 N, R 23 E
Odd sections 3, 5, 7, 9, 17, 19, 29 and 31..
T 22 N, R 15 E
Odd sections 13, 25 and 35.
T 22 N, R 16 E
Odd sections 1-35 inclusive.
T 22 N, R 17 E
Odd sections 1-35 inclusive.

T 22 N, R 18 E

Odd sections 1-35 inclusive.

T 22 N, R 19 E

Odd sections 1-35 inclusive.

T 22 N, R 20 E

Odd sections 1-35 inclusive.

T 22 N, R 21 E

Odd sections 1-35 inclusive. Townsite of Spavinaw occupies part of section 15.

T 22 N, R 22 E

Odd sections 1, 3, 5, 7, 9, 11, 15, 17, 19, 21, 23, 27, 29, 31 and 33.

T 21 N, R 15 E

Odd sections 1, 11, 13, 23, 25, 27 and 35.

T 21 N, R 16 E

Odd sections 1-35 inclusive. Townsite of Claremore occupies part of section 9.

T 21 N, R 17 E

Odd sections 1-35 inclusive.

T 21 N, R 18 E

Odd sections 1-35 inclusive.

T 21 N, R 19 E

Odd sections 1-35 inclusive. Townsite of Pryor Creek occupies part of section 7.

Odd sections 1-35 inclusive.

T 21 N, R 20 E

Odd sections 1-35 inclusive.

T 21 N, R 21 E

Odd sections 1-35 inclusive.

T 21 N, R 22 E

Odd sections 3, 5, 7, 9, 17, 19, 21, 29 and 31.

T 20 N, R 15 E

Odd sections 1, 3, 11, 13, 15, 23, 25, 27 and 35.

T 20 N, R 16 E

Odd sections 1-35 inclusive.

T 20 N, R 17 E
Odd sections 1-35 Inciusive.
T 20 N, R 18 E
Odd sections 1-35 inclusive. Township of Choteau occupies part of section 25.
T 20 N, R 19 E
Odd sections 1-35 Inciusive.
T 20 N, R 20 E
Odd sections 1-35 Inciusive.
T 20 N, R 21 E
Odd sections 1-35 Inciusive.
T 20 N, R 22 E
Odd sections 5, 7, 17, 19, 29 and 31.
T 19 N, R 15 E
Odd sections 1, 3, 9, 11, 13, 15, 21, 23, 25, 27, 33 and 35.
T 19 N, R 16 E
Odd sections 1-35 Inciusive.
T 19 N, R 17 E
Odd sections 1-35 Inciusive.
T 19 N, R 18 E
Odd sections 1-35 Inciusive.
T 19 N, R 19 E
Odd sections 1-35 Inciusive.
T 19 N, R 20 E
Odd sections 1-35 Inciusive.
T 19 N, R 21 E
Odd sections 1-35 Inciusive.
T 19 N, R 22 E
Odd sections 5, 7, 19 and 31.
T 18 N, R 15 E
Odd sections 1, 3, 9, 11, 13, 15, 17, 21, 23, 25, 27, 29, 33 and 35.
T 18 N, R 16 E
Odd sections 1-35 inclusive.

T 18 N, R 17 E
Odd sections 1-35 inclusive.
T 18 N, R 18 E
Odd sections 1-35 inclusive.
T 18 N, R 19 E
Odd sections 1-35 inclusive.
T 18 N, R 20 E
Odd sections 1-35 inclusive.
T 18 N, R 21 E
Odd sections 1-35 inclusive.
T 17 N, R 15 E
Odd sections 1, 3, 5, 9, 11, 13, 15, 17, 21, 23, 25, 27, 29, 33 and 35. Townsite of Coweta occupies part of section 13.
T 17 N, R 16 E
Odd sections 1-35 inclusive.
T 17 N, R 17 E
Odd sections 1-35 inclusive.
T 17 N, R 18 E
Odd sections 1-35 inclusive. Townsite of Wagoner occupies part of sections 9, 11 and all of section 15.
Cemetery part of section 25.
T 17 N, R 19 E
Odd sections 1-35 inclusive.
T 17 N, R 20 E
Odd sections 1-35 inclusive.
T 17 N, R 21 E
Odd sections 1-35 inclusive.
T 17 N, R 22 E
Odd section 19 and 31.
T 16 N, R 15 E
Odd sections 1, 3, 9, 11, 13, 15, 21, 23, 25, 27, 33 and 35.
T 16 N, R 16 E
Odd sections 1-35 inclusive.

T 16 N, R 17 E
Odd sections 1-35 inclusive. Townsite of Clarksville occupies part of section 33.
T 16 N, R 18 E
Odd sections 1-35 inclusive. Townsite of Gibson Station occupies part of section 13.
T 16 N, R 19 E
Odd sections 1-35 inclusive.
T 16 N, R 20 E
Odd sections 1-35 inclusive.
T 16 N, R 21 E
Odd sections 1-35 inclusive.
T 16 N, R 22 E
Odd sections 5, 7, 9, 17, 19, 21, 29, 31 and 33.
T 15 N, R 14 E
Odd section 25.
T 15 N, R 15 E
Odd sections 1, 3, 5, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 31, 33 and 35.
T 15 N, R 16 E
Odd sections 1-35 inclusive.
T 15 N, R 17 E
Odd sections 1-35 inclusive.
T 15 N, R 18 E
Odd sections 1-35 inclusive. Townsite of Muskogee occupies part of sections 23, 25, 27 and 35.
T 15 N, R 19 E
Odd sections 1-35 inclusive. Cemetery occupies part of section 19.
Townsite of Ft. Gibson occupies part of sections 1 and 11.
T 15 N, R 20 E
Odd sections 1-35 inclusive.
T 15 N, R 21 E
Odd sections 1-35 inclusive.

T 15 N, R 22 E

Odd sections 5, 7, 9, 17, 19, 21, 29 and 31.

T 14 N, R 14 E

Odd sections 1, 11, 13, 15, 23, 25, 27, 33 and 35.

T 14 N, R 15 E

Odd sections 1-35 inclusive. Townsite of Lee (Wellington) occupies part of section 13.

T 14 N, R 16 E

Odd sections 1-35 inclusive.

T 14 N, R 17 E

Odd sections 1-35 inclusive.

T 14 N, R 18 E

Odd sections 1-35 inclusive.

T 14 N, R 19 E

Odd sections 1-35 inclusive.

T 14 N, R 20 E

Odd sections 1-35 inclusive. Townsite of Braggs occupies part of section 29.

T 14 N, R 21 E

Odd sections 1-35 inclusive.

T 14 N, R 22 E

Odd sections 5, 7, 19 and 33.

T 13 N, R 14 E

Odd sections 1, 3, 9, 11, 13, 15, 17, 21, 23, 25, 27, 29, 31, 33 and 35.

T 13 N, R 15 E

Odd sections 1-35 inclusive.

T 13 N, R 16 E

Odd sections 1-35 inclusive.

T 13 N, R 17 E

Odd sections 1-35 inclusive.

T 13 N, R 18 E

Odd sections 1-35 inclusive.

T 13 N, R 19 E

Odd sections 1-35 inclusive. Townsite of McLain occupies part of 27 and 35.

T 13 N, R 20 E
Odd sections 1-35 inclusive.
T 13 N, R 21 E
Odd sections 1, 3, 5, 7, 9, 11, 15, 17, 19, 21, 29, 31 and 33.
T 12 N, R 13 E
Odd sections 13, 25 and 35.
T 12 N, R 14 E
Odd sections 1-35 inclusive. Townsite of Wild Cat occupies part of section 19.
T 12 N, R 15 E
Odd sections 1-35 inclusive.
T 12 N, R 16 E
Odd sections 1-35 inclusive.
T 12 N, R 17 E
Odd sections 1-35 inclusive. Townsite of Checotah occupies part of section 33.
T 12 N, R 18 E
Odd sections 1-35 inclusive.
T 12 N, R 19 E
Odd sections 1-35 inclusive. Townsite of Bennett occupies part of section 31.
T 12 N, R 20 E
Odd section 1-35 inclusive. Townsite of Webber's Falls occupies part of section 13.
T 12 N, R 21 E
Odd sections 5, 7 and 19. Townsite of Campbell occupies part of section 7.
T 11 N, R 13 E
Odd sections 1, 11, 13, 23, 25, 27 and 35.
T 11 N, R 14 E
Odd sections 1-35 inclusive.
T 11 N, R 15 E
Odd sections 1-35 inclusive.
T 11 N, R 16 E
Odd sections 1-35 inclusive.

T 11 N, R 17 E
Odd sections 1-35 inclusive.
T 11 N, R 18 E
Odd sections 1-35 inclusive.
T 11 N, R 19 E
Odd sections 1-35 inclusive.
T 11 N, R 20 E
Odd sections 3, 5, 7, 9, 11, 15, 17, 19, 21, 23, 27, 29, 31 and 33.
T 10 N, R 13 E
Odd sections 1, 3, 9, 11, 13, 15, 17, 21, 23, 25, 27, 29, 31, 33 and 35.
T 10 N, R 14 E
Odd sections 1-35 inclusive.
T 10 N, R 15 E
Odd sections 1-35 inclusive.
T 10 N, R 16 E
Odd sections 1-35 inclusive. Townsite of Eufaula occupies part of section 35.
T 10 N, R 17 E
Odd sections 1-35 inclusive.
T 10 N, R 18 E
Odd sections 1-35 inclusive. Townsite of Texanna occupies part of sections 7 and 17.
T 10 N, R 19 E
Odd sections 1-35 inclusive.
T 10 N, R 20 E
Odd sections 5, 7, 9, 17, 19, 29 and 31. Townsite of Briartown occupies part of section 31.
T 9 N, R 12 E
Odd sections 1, 13, 23, 25 and 35.
T 9 N, R 13 E
Odd sections 1-35 inclusive.
T 9 N, R 14 E
Odd sections 1-35 inclusive.

T 9 N, R 15 E
Odd sections 1-35 inclusive.
T 9 N, R 16 E
Odd sections 1-35 inclusive. Townsite of Eufaula occupies part of section 1.
T 9 N, R 17 E
Odd sections 1-35 inclusive.
T 9 N, R 18 E
Odd sections 1-35 inclusive. Townsite of Enterprise occupies part of section 27.
T 9 N, R 19 E
Odd sections 1-35 inclusive. Townsite of Hoyt occupies part of section 9.
T 9 N, R 20 E
Odd sections 7, 19 and 31.
T 8 N, R 12 E
Odd sections 1, 3, 11, 13, 15, 21, 23, 25, 27, 33 and 35.
T 8 N, R 13 E
Odd sections 1-35 inclusive.
T 8 N, R 14 E
Odd sections 1-35 inclusive.
T 8 N, R 15 E
Odd sections 1-35 inclusive.
T 8 N, R 16 E
Odd sections 1-35 inclusive. Townsite of Canadian occupies part of section 7
T 8 N, R 17 E
Odd sections 1-35 inclusive.
T 8 N, R 18 E
Odd sections 1-35 inclusive.
T 8 N, R 19 E
Odd sections 1-35 inclusive.
T 7 N, R 11 E
Odd section 25.
T 7 N, R 12 E
Odd sections 1-35 inclusive.

T 7 N, R 13 E
Odd sections 1-35 inclusive.
T 7 N, R 14 E
Odd sections 1-35 inclusive.
T 7 N, R 15 E
Odd sections 1-35 inclusive.
T 7 N, R 16 E
Odd sections 1-35 inclusive.
T 7 N, R 17 E
Odd sections 1-35 inclusive.
T 7 N, R 18 E
Odd sections 1-35 inclusive.
T 7 N, R 19 E
Odd sections 3, 5, 7, 9, 15, 17, 19, 21, 21 and 31.
T 6 N, R 11 E
Odd sections 1, 11, 13, 15, 21, 23, 25, 27, 29, 33 and 35.
T 6 N, R 12 E
Odd sections 1-35 inclusive.
T 6 N, R 13 E
Odd sections 1-35 inclusive.
T 6 N, R 14 E
Odd sections 1-35 inclusive.
T 6 N, R 15 E
Odd sections 1-35 inclusive. Townsite of McAlester occupies part of sections 29 and 31.
Townsite of South McAlester occupies part of section 31.
T 6 N, R 16 E
Odd sections 1-35 inclusive.
T 6 N, R 17 E
Odd sections 1-35 inclusive.
T 6 N, R 18 E
Odd sections 1-35 inclusive.
T 5 N, R 10 E
Odd sections 13, 25 and 35.

T 5 N, R 11 E
Odd sections 1-35 inclusive.
T 5 N, R 12 E
Odd sections 1-35 inclusive.
T 5 N, R 13 E
Odd sections 1-35 inclusive.
T 5 N, R 14 E
Odd sections 1-35 inclusive. Townsite of South McAlester occupies part of section 1.
T 5 N, R 15 E
Odd sections 1-35 inclusive. Townsite of South McAlester occupies part of sections 5 and 7. Townsite of Krebs occupies part of sections 3 and 9.
T 5 N, R 16 E
Odd sections 1-35 inclusive.
T 5 N, R 17 E
Odd sections 1-35 inclusive. Townsite of Gowen occupies part of section 19.
T 5 N, R 18 E
Odd sections 3, 5, 7, 9, 15, 17, 19, 21, 29 and 31.
T 4 N, R 10 E
Odd sections 1, 11, 13, 15, 23, 25, 27, 33 and 35.
T 4 N, R 11 E
Odd sections 1-35 inclusive.
T 4 N, R 12 E
Odd sections 1-35 inclusive.
T 4 N, R 13 E
Odd sections 1-35 inclusive.
T 4 N, R 14 E
Odd sections 1-35 inclusive. Townsite of Savanna occupies part of section 9
T 4 N, R 15 E
Odd sections 1-35 inclusive.
T 4 N, R 16 E
Odd sections 1-35 inclusive.

T 4 N, R 17 E
Odd sections 1-35 inclusive. Townsite of Hartshorn occupies part of section 7.
T 4 N, R 18 E
Odd sections 5, 7 and 19.
T 3 N, R 9 E
Odd sections 25 and 35.
T 3 N, R 10 E
Odd sections 1-35 inclusive.
T 3 N, R 11 E
Odd sections 1-35 inclusive.
T 3 N, R 12 E
Odd sections 1-35 inclusive.
T 3 N, R 13 E
Odd sections 1-35 inclusive. Townsite of Kiowa occupies part of sections 13 and 23.
T 3 N, R 14 E
Odd sections 1-35 inclusive.
T 3 N, R 15 E
Odd sections 1-35 inclusive.
T 3 N, R 16 E
Odd sections 1-35 inclusive.
T 3 N, R 17 E
Odd sections 1 3, 5, 7, 9, 11, 15, 17, 19, 21, 29 and 31.
T 2 N, R 9 E
Odd sections 1, 3, 11, 13, 15, 21, 23, 25, 27, 33 and 35.
T 2 N, R 10 E
Odd sections 1-35 inclusive.
T 2 N, R 11 E
Odd sections 1-35 inclusive.
T 2 N, R 12 E
Odd sections 1-35 inclusive.
T 2 N, R 13 E
Odd sections 1-35 inclusive.
T 2 N, R 14 E
Odd sections 1-35 inclusive.

T 2 N, R 15 E
Odd sections 1-35 inclusive.
T 2 N, R 16 E
Odd sections 1-35 inclusive.
T 2 N, R 17 E
Odd section 7.
T 1 N, R 8 E
Odd sections 25 and 35.
T 1 N, R 9 E
Odd sections 1-35 inclusive. Townsite of Oconee occupies part of section 29.
T 1 N, R 10 E
Odd sections 1-35 inclusive. Townsite of Coalgate occupies part of sections 23 and 25.
Townsite of Phillips occupies part of section 35.
T 1 N, R 11 E
Odd sections 1-35 inclusive.
T 1 N, R 12 E
Odd sections 1-35 inclusive.
T 1 N, R 13 E
Odd sections 1-35 inclusive.
T 1 N, R 14 E
Odd sections 1-35 inclusive.
T 1 N, R 15 E
Odd sections 1-35 inclusive.
T 1 N, R 16 E
Odd sections 3, 5, 7, 9, 15, 17, 19, 21, 29, 31 and 33.
T 1 S, R 8 E
Odd sections 1, 3, 11, 13, 15, 21, 23, 25, 27, 29, 33 and 35.
T 1 S, R 9 E
Odd sections 1-35 inclusive.
T 1 S, R 10 E
Odd sections 1-35 inclusive. Townsite of Lehigh occupies part of sections 11, 13 and 23.

T 1 S, R 11 E
Odd sections 1-35 inclusive.
T 1 S, R 12 E
Odd sections 1-35 inclusive.
T 1 S, R 13 E
Odd sections 1-35 inclusive.
T 1 S, R 14 E
Odd sections 1-35 inclusive.
T 1 S, R 15 E
Odd sections 1-35 inclusive.
T 1 S, R 16 E
Odd sections 5, 7 and 19.
T 2 S, R 7 E
Odd sections 13, 25 and 35.
T 2 S, R 8 E
Odd sections 1-35 inclusive. Townsite of Wapanucka occupies part of sections 13 and 23.
T 2 S, R 9 E
Odd sections 1-35 inclusive.
T 2 S, R 10 E
Odd sections 1-35 inclusive.
T 2 S, R 11 E
Odd sections 1-35 inclusive. Townsite of Atoka occupies part of sections 11 and 15.
T 2 S, R 12 E
Odd sections 1-35 inclusive.
T 2 S, R 13 E
Odd sections 1-35 inclusive.
T 2 S, R 14 E
Odd sections 1-35 inclusive.
T 2 S, R 15 E
Odd sections 3, 5, 7, 9, 15, 17, 19, 21, 29, 31 and 33.
T 3 S, R 7 E
Odd sections 1, 11, 13, 15, 23, 25, 27, 33 and 35.
T 3 S, R 8 E
Odd sections 1-35 inclusive.

T 3 S, R 9 E
Odd sections 1-35 inclusive. Townsite of Boggy Depot occupies part of section 13.
T 3 S, R 10 E
Odd sections 1-35 inclusive.
T 3 S, R 11 E
Odd sections 1-35 inclusive.
T 3 S, R 12 E
Odd sections 1-35 inclusive.
T 3 S, R 13 E
Odd sections 1-35 inclusive.
T 3 S, R 14 E
Odd sections 1-35 inclusive.
T 3 S, R 15 E
Odd sections 5, 7 and 19.
T 4 S, R 6 E
Odd sections 13, 23, 25, 27 and 35.
T 4 S, R 7 E
Odd sections 1-35 inclusive.
T 4 S, R 8 E
Odd sections 1-35 inclusive. Townsite of Folson occupies part of section 1
T 4 S, R 9 E
Odd sections 1-35 inclusive.
T 4 S, R 10 E
Odd sections 1-35 inclusive. Townsite of Caney occupies part of section 1.
T 4 S, R 11 E
Odd sections 1-35 inclusive.
T 4 S, R 12 E
Odd sections 1-35 inclusive.
T 4 S, R 13 E
Odd sections 1-35 inclusive.
T 4 S, R 14 E
Odd sections 3, 5, 7, 9, 17, 19, 29 and 31.

T 5 S, R 6 E

Odd sections 1, 3, 9, 11, 13, 15, 17, 21, 23, 25, 27, 29, 31, 33 and 35.

T 5 S, R 7 E

Odd sections 1-35 inclusive. Townsite of Bee occupies part of section 15.

T 5 S, R 8 E

Odd sections 1-35 inclusive.

T 5 S, R 9 E

Odd sections 1-35 inclusive.

T 5 S, R 10 E

Odd sections 1-35 inclusive. Townsite of Caddo occupies part of sections 9 and 17.

T 5 S, R 11 E

Odd sections 1-35 inclusive.

T 5 S, R 12 E

Odd sections 1-35 inclusive.

T 5 S, R 13 E

Odd sections 1-35 inclusive.

T 5 S, R 14 E

Odd sections 7 and 19.

T 6 S, R 5 E

Odd sections 1, 11, 13, 15, 21, 23, 25, 27, 29, 31, 33 and 35.

T 6 S, R 6 E

Odd sections 1-35 inclusive. Townsite of Cliff occupies part of section 17.

T 6 S, R 7 E

Odd sections 1-35 inclusive. Townsite of Cumberland occupies part of section 5.

Townsite of Ayelsworth occupies part of section 17.

T 6 S, R 8 E

Odd sections 1-35 inclusive. Townsite of Silo occupies part of section 9.

T 6 S, R 9 E
Odd sections 1 to 35 inclusive. Townsite of Durant occupies part of sections 29, 31 and 33.

T 6 S, R 10 E
Odd sections 1-35 inclusive. Townsite of Hunter occupies part of section 33.

T 6 S, R 11 E
Odd sections 1-35 inclusive.

T 6 S, R 12 E
Odd sections 1-35 inclusive. Townsite of Bennington occupies part of section 27.

T 6 S, R 13 E
Odd sections 3, 5, 7, 9, 11, 15, 17, 19, 21, 29, 31 and 33.

T 7 S, R 5 E
Odd sections 1, 3, 5, 9, 11 and 13.

T 7 S, R 6 E
Odd sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29 and 35. Townsite of Wood occupies part of section 25.

T 7 S, R 7 E
Odd sections 1-35 inclusive. Townsite of Platter occupies part of section 35.

T 7 S, R 8 E
Odd sections 1-35 inclusive. Townsite of Storret (P. O.) Cole occupies part of section 23.

T 7 S, R 9 E
Odd sections 1-35 inclusive. Townsite of Durant occupies part of section 5.

T 7 S, R 10 E
Odd sections 1-35 inclusive. Townsite of Utica occupies part of section 35.

T 7 S, R 11 E
Odd sections 1-35 inclusive.

T 7 S, R 12 E

Odd sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 27, 29, 31 and 33.

T 7 S, R 13 E

Odd sections 5 and 7.

T 8 S, R 7 E

Odd sections 1, 3, 9, 11, 13, 15, 17, 21, 23, 25 and 27. (Townsite of Gray?)

T 8 S, R 8 E

Odd sections 1-35 inclusive. Townsite of Colbert occupies part of sections 17 and 19.

T 8 S, R 9 E

Odd sections 1-35 inclusive.

T 8 S, R 10 E

Odd sections 1-35 inclusive.

T 8 S, R 11 E

Odd sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 27, 29, 31 and 33. Townsite of Albany occupies part of sections 5 and 9.

T 8 S, R 12 E

Odd sections 3, 5, 7, 9, 17 and 19.

T 9 S, R 8 E

Odd sections 1, 3, 5, 9, 11, 13 and 15.

T 9 S, R 9 E

Odd sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23, 25, 27, 29, 33 and 35. Townsite of Kemp occupies part of section 15.

T 9 S, R 10 E

Odd sections 1, 3, 5, 7, 9, 11, 13, 15, 17, 19, 21, 23 and 31.

T 9 S, R 11 E

Odd sections 3, 5, 7, 9, 17 and 19.

T 10 S, R 9 E

Odd sections 1, 3 and 11.

EXHIBIT 44

SUPREME COURT OF THE UNITED STATES.

No. 11 Original. October Term, 1906.

The State of Kansas, Complainant,

vs.

The United States of America et al., Defendants.

(February 25, 1907.)

Mr. Chief Justice Fuller delivered the opinion of the Court:

On April 30, 1906, the State of Kansas applied for leave to file a bill of complaint against the United States and others, to which the United States objected on the ground of want of jurisdiction. May 21 leave was granted, without prejudice, and the bill was accordingly filed. As such an application by a State is usually granted as of course, we thought it wiser to allow the bill to be filed, but reserving to the United States the right to object to the jurisdiction thereafter, and hence the words, "without prejudice," were inserted in the order. October 9 leave was granted to the United States to file a demurrer, and in lieu of this a motion to dismiss was substituted, which was submitted November 12 on printed briefs on both sides.

The bill was filed by the Attorney General of Kansas, on behalf of the State, as trustee for the Missouri, Kansas and Texas Railway Company, of certain lands in the Indian Territory, alleged to have been granted to the State for the benefit of the railway company.

It is stated by counsel for complainant, as appearing from the bill, that in 1866 "there were three Kansas railroad companies running through the State to the Indian

Territory line. The first was the Union Pacific Railway Company, Southern Branch, since the Missouri, Kansas and Texas Railway Company, extending from Fort Riley, now Junction City, Kansas, in a southeasterly direction, down the valley of the Neosho river to the southern line of the State of Kansas, near Chetopa, Kansas; the second was the Leavenworth, Lawrence and Fort Gibson Railway Company, since conveyed to the Atchison, Topeka and Santa Fe Railroad Company, extending from Leavenworth, through Lawrence, to the northern line of the Indian Territory, near Coffeyville, Montgomery county, Kansas, in the direction of Galveston Bay, in Texas; and the third was the Kansas and Neosho Valley Railway Company, since the Kansas City, Fort Scott and Memphis, and now a part of the St. Louis and San Francisco Railroad Company, extending from a point of connection with the Union Pacific Railroad at or near the mouth of the Kansas river; thence southeasterly, through the eastern tier of counties, to the northern line of the Indian Territory, at or near Baxter Springs, in Cherokee county, Kansas."

On July 25, 1866, an act of Congress was passed entitled "An Act granting lands to the State of Kansas to aid in the construction of the Kansas and Neosho Valley Railroad and its extension to Red River." 14 Stat. 236, c. 241. On the next day, July 26, an act was passed, using the same language, except as to the routes, entitled "An Act granting lands to the State of Kansas to aid in the construction of a southern branch of the Union Pacific Railway and Telegraph Company, from Fort Riley, Kansas, to Fort Smith, Arkansas," 14 Stat. 289, c. 270, which provided as follows:

"That for the purpose of aiding the Union Pacific Railroad Company, Southern Branch, the same being a corporation organized under the laws of the State of

Kansas to construct and operate a railroad from Fort Riley, Kansas, or near said military reservation, thence down the valley of the Neosho river to the southern line of the State of Kansas, with a view to an extension of the same through a portion of the Indian Territory to Fort Smith, Arkansas, there is hereby granted to the State of Kansas, for the use and benefit of said railroad company every alternate section of land or parts thereof designated by odd numbers, to the extent of five alternate sections per mile on each side of said road and not exceeding in all ten sections per mile, * * *"

"SEC. 3. * * * And the lands hereby granted shall inure to the benefit of said company as follows: When the governor of the State of Kansas shall certify that any section of ten consecutive miles of said road is completed in a good, substantial, and workmanlike manner as a first class railroad, then the said Secretary of the Interior shall issue to said company patents for so many sections of the land herein granted within the limits above named, and coterminus with said completed section hereinbefore granted; * * *"

"SEC. 8. And be it further enacted, That the said Pacific Railway Company, Southern Branch, its successors and assigns, is hereby authorized and empowered to extend and construct its railroad from the southern boundary of Kansas, south through the Indian Territory, with the consent of the Indians, and not otherwise, along the valley of Grand and Arkansas rivers, to Fort Smith, in the State of Arkansas; and the right of way through said Indian Territory is hereby granted to said company, its successors and assigns, to the extent of one hundred feet on each side of said road or roads, and all necessary grounds for stations, buildings, work shops, machine shops, switches, side tracks, turn-tables, and water stations.

"SEC. 9. And be it further enacted, That the same grant(s) of lands through said Indian Territory are hereby made as provided in the first section of this act, whenever the Indian title shall be extinguished by treaty or otherwise, not to exceed the ratio per mile granted in the first section of this act: *Provided*, That said lands become a part of the public lands of the United States."

The bill averred that the road was constructed through the Indian Territory, and set forth at length Indian treaties and Congressional legislation with reference to that Territory, under which it was alleged that the Creek Indian Nation had ceased to occupy or claim the lands in question as a tribe or nation, and that some of the lands had been allotted in severalty to individual members of the Creek Nation; and that thereby said lands passed to the State under the provisions of the grant mentioned. It was prayed that a decree be entered adjudging the State to be the owner, as trustee for the railway company, of all odd numbered sections of land to the extent of the grant along the line of the road through the Creek Nation, in the Indian Territory, and that the allottees be directed to surrender the possession to the State as trustee and be enjoined from disposing of said lands, or "in the event that from any equitable considerations the court shall entertain the view that the allottees and those claiming under them should not be disturbed, then that an account be taken of the value of the lands in controversy," and that the United States be adjudged to pay to the State as trustee the sum of such values, estimated at more than $10,000,000.

In our opinion it appears upon the face of the bill that the State of Kansas is only nominally a party, and that the real party in interest is the railroad company. Section 3 provided that patents should be issued not to

the State but to the company direct, which made the State nothing but a mere conduit for the passage of the title. And this is so even if it were ruled that the State of Kansas was made trustee under section 9, because it would only be trustee of the bare legal title. In very many cases "in which the grant was directly to the railroad company, or in which the act of Congress required that the patents for lands earned should be issued, not to the State for the benefit of the railroad company, but directly to the company itself," it has been held that the title vested absolutely in the railroad company. Sioux City etc., Railroad Co. vs. United States, 159 U. S. 349, 363.

Title passed by the grant on the performance of its conditions and to the grantees to whom the patents were to be issued, and here section 3 provided that patents should issue not to the State but to the railroad company direct.

And if the lands in the Indian Territory could be held in any view to have been granted in praesenti, such grant was certainly not to the State of Kansas.

The road, in aid of which the grant was made to the State, extended no farther than the southern boundary thereof, and the patents were to be issued to the company. True, as declared in section 1, the road was to be constructed "with a view to an extension of the same through a portion of the Indian Territory to Fort Smith, Arkansas," and that extension was authorized by section 8, but the lands referred to in Section 9 were not lands in the State of Kansas, nor was that State mentioned in the section. It seems clear that those lands were not intended to be granted to that State for the construction of a road beyond its boundaries.

Moreover, the bill sets forth many communications and protests by the railroad company to the Dawes

Commission, the townsite commission, the Indian agent and the Secretary of the Interior, in all of which the tracts in controversy were claimed by the railroad company as its own without reference to any interest of the State of Kansas therein.

In these circumstances we think it apparent that the name of the State is being used simply for the prosecution in this Court of the claim of the railroad company, and our original jurisdiction cannot be maintained.

Again, the United States is the real party in interest as defendant and has not consented to be sued, which it cannot be without its consent. Minnesota v. Hitchcock, 185 U. S. 373, 387; Oregon v. Hitchcock, 202 U. S. 60; United States v. Lee, 106 U. S. 196, 207.

"If whether a suit is one against a State is to be determined, not by the fact of the party named as defendant on the record, but by the result of the judgment or decree which may be entered, the same rule must apply to the United States. The question whether the United States is a party to a controversy is not determined by the merely nominal party on the record but by the question of the effect of the judgment or decree which can be entered."

In the present case the parties defendant other than the United States and its officers are Creek Indian allottees and persons claiming under them, and if their allotments should be taken from them, which is part of the relief sought by the bill, the United States would be subject to a demand from them for the value thereof or for other lands, while the bill prays in the alternative that "in the event that from any equitable considerations the court should entertain the view that the allottees and those claiming under them should not be disturbed, then that an account be taken of the value of the lands

in controversy at the time of the respective allotments, and the defendants, the United States of America, be ordered, adjudged, and decreed to pay to your oratrix, as trustee, the sum of such value."

It does not follow that because a State may be sued by the United States without its consent, therefore the United States may be sued by a State without its consent. Public policy forbids that conclusion.

In United States v. Texas, 143 U. S. 621, 646, it was held that the exercise by this court of original jurisdiction "in a suit brought by one State against another to determine the boundary line between them, or in a suit brought by the United States against a State to determine the boundary between a Territory of the United States and that State, so far from infringing, in either case, upon the sovereignty, is with the consent of the State sued. Such consent was given by Texas when admitted into the Union upon an equal footing in all respects with the other States.' That case was quoted from with approval in Minnesota v. Hitchcock, supra, where Mr. Justice Brewer, delivering the opinion, pointed out that the judicial power of the United States extends to cases in which the United States is a party plaintiff as well as to cases in which it is a party defendant, for "while the United States as a government may not be sued without its consent, yet with its consent it may be sued, and the judicial power of the United States extends to such a controversy."

We are not dealing here with the merits of the controversy raised by the bill, but solely with the question of the original jurisdiction of this court. And as the United States has not consented to be sued, it results that on this ground also the bill must be dismissed.

And it is so ordered.

Mr. Justice Moody took no part in the disposition of this case.

True copy.
Test:

CLERK SUPREME COURT, U. S.

II. *Demurrer.*

Filed June 22, 1907.

And now comes the said defendant, by its Attorney General, and demurring to the petition in this cause, states as the grounds thereof.

1. That the matters complained of are not within the jurisdiction of this honorable Court and are not cognizable therein.

2. That the petition does not allege facts sufficient to constitute a cause of action falling within the jurisdiction of this honorable Court.

Wherefore defendant prays judgment.

J. A. VAN ORSDEL,
Assistant Attorney General.

III. *Argument and Submission of Demurrer.*

The demurrer in this case came on to be heard April 18, 1911. Mr. F. De C. Faust, on behalf of the defendants, was heard in support of the demurrer. He was followed by Mr. Joseph M. Bryson, Mr. Aldis B. Browne and Mr. Joseph H. Choate for the claimant in opposition. Mr. Assistant Attorney-General John Q. Thompson replied and the demurrer was submitted April 20, 1911.

IV. *Opinion of the Court Sustaining the Demurrer with Leave to Claimant to Amend its Petition.*

Filed Dec. 4, 1911.

BOOTH, *J.*, delivered the opinion of the court.

This is a demurrer to claimant's petition. The Missouri, Kansas & Texas Railway Co., claimant herein, is a Kansas corporation and was originally incorporated under the name of Union Pacific Railroad, Southern Branch. In 1870, by the consent and approval of the Kansas Legislature, it assumed its present name and has retained it since. Claimant company is a land-grant road, and as such is here claiming the benefits of a land-grant act passed July 25, 1866. On March 3, 1863 (12 Stats. 772), Congress granted certain specified sections of the public lands in Kansas to that State to aid in the construction of a railroad from Atchison on its eastern border, via Topeka, the capital of the State, thence across the entire State to its western boundary. The same act provided for a branch line extending from what is now Emporia, Kans., down the Neosho River Valley to intersect with the line of the Leavenworth, Lawrence & Fort Gibson Railroad. The grant of public lands contained in the act was accepted by the Atchison, Topeka & Santa Fe Railway Co. upon certain conditions, one of which was a concession with a similar grant to construct a branch line northward from Emporia to intersect the Union Pacific Railroad, Eastern Branch, at Fort Riley (now

Junction City, Kans.). On July 1, 1864 (13 Stats., 339), Congress extended the grant of 1863 to the northern branch, and the Atchison, Topeka & Santa Fe Co. accepted the same. The Atchison, Topeka & Santa Fe Co. constructed the main line across the State from east to west, but did not construct the branch lines. On March 19, 1866, the Atchison, Topeka & Santa Fe assigned to claimant company all its right, title, and interest in the grant respecting the branch lines, and the claimant company, with the consent of the Kansas Legislature, accepted the grant and assumed its obligations. The claimant company's original articles of incorporation intended the construction of a railroad from Fort Riley on the line of the Union Pacific, of which system it was then a part, southward through the Neosho River Valley to the southern boundary of Kansas, with power to extend its line across Indian Territory. In 1866 and before the grant had been earned under the acts of 1863 and 1864 the Congress, on July 25, 1866, passed two acts, one on July 25, 1866, and the other the following day, July 26, 1866. Rights under the last statute are not involved here, the act of July 25, 1866 (14 Stats., 236), being the one upon which the claimant company predicate their case. The granting clauses of these two subsequent statutes did, however, materially modify the terms and conditions of the former acts of 1863 and 1864 respecting the Neosho Valley lines. The first section of the act of 1866 granted to the State of Kansas, for the use and benefit of the Kansas & Neosho Valley Railroad Co., a Kansas corporation, every alternate section of land, or parts thereof, designated by odd numbers, to the extent of 10 sections per mile on each side of said road, to be selected within 20 miles of the line of said road, with power and authority given to select indemnity lands in cases where the United States had previously disposed of any of said sections by sale, preemption, or homestead entries. The usual clauses as to previous reservations, railroad rights of way, etc., were included in the act. The purpose of the grant was to aid in the construction of a railroad from the eastern terminus of the Union Pacific, on the line between Missouri and Kansas, thence southward across the eastern tier of counties in said State, with an ultimate view of connecting at Red River, at or near Preston (now Denison), Tex., with a railroad then in course of construction from Galveston, Tex., to that point. In furtherance of this comprehensive scheme of railroad building, section 9 of the act of July 25, 1866, provided "that the same grants of lands through said Indian Territory are hereby made as provided in the first section of this act, whenever the Indian title shall be extinguished by treaty or otherwise, not to exceed the ratio per mile granted in the first section of this act: Provided, That the lands become a part of the public lands of the United States."

Section 11 of the act of 1866 provided, among other things, as follows: "That should the Leavenworth, Lawrence and Fort Gibson Railroad Company, or the Union Pacific Railroad Company, Southern Branch, construct and complete its road to that point on the southern boundary of the State of Kansas where the line of the said Kansas and Neosho Valley Railroad shall cross the same, before the said Kansas and Neosho Valley Railroad Company shall have constructed and completed its said road to said point, then in that

event the company so first reaching in completion the said point on the southern boundary of the State of Kansas shall be authorized, upon obtaining the written approval of the President of the United States, to construct and operate its line of railroad from said point to a point at or near Preston, in the State of Texas, with grants of lands according to the provisions of this act * * *."

The claimant company, acting under said act, entered upon the construction of its road, and was the first of the competing lines to reach the point designated in the act. On July 22, 1870, it was formally notified of its rights under the statute and duly authorized upon compliance with certain formalities to proceed with the construction of its road through Indian Territory.

The petition alleges, and it is not here open to dispute, that it did proceed with reasonable dispatch to complete its line through Indian Territory, and that the same was accepted and approved by the proper officers of the Government as a compliance with the statute in 1873. The petition further alleges that, in pursuance of a general governmental policy, the United States, through Congress, the executive departments, the Secretary of the Interior, the Commission to the Five Civilized Tribes, and the various townsite commissions, has extinguished the Indian title to said lands by treaties and legislation relative thereto; that the greater portion of said lands have been allotted to the individual Indians belonging to said tribes, patents issued therefor, and the unallotted lands sold by the defendants to purchasers other than Indians and otherwise disposed of, irrespective of claimant's right and title thereto, and despite its repeated protests to each and all the proceedings. The petition concludes with the averment that the United States has extinguished the Indian title to all of said lands embraced within its grant; that said lands did become a part of the public lands of the United States; that the United States not only failed to carry into execution its obligations under the act of July 25, 1866, but by allotting to said Indians and otherwise selling and disposing of said lands, made the performance of the contract impossible upon its part, thereby depriving the petitioner of 3,114,368 acres of land of the value of $61,287,800, for which amount it asks judgment.

The issue raised by defendants' general demurrer involves the construction of the act of July 25, 1866, defendants contending that under the allegations of the petition the lands claimed for never became public lands within the intention of the parties; that the Indian title to said lands if extinguished was done in pursuance of previous valid subsisting treaties so to do; that the grant to claimant company was not in præsenti, but more in the nature of a promise of a grant to be made in futuro upon the happening of certain contingencies.

The statute is anomalous. A land grant act containing similar terms and conditions has not been shown the court, and doubtless none exists. The general purpose of the legislation is not difficult to ascertain. The Congress evidently was concerned in aiding and thereby procuring a connecting line of railroad extending from the main line of the Union Pacific to the Gulf of Mexico. The Civil War and the advancing settlement of the West had demonstrated its

necessity. To facilitate its construction the eleventh section of the act sets up a competition between substantially three parallel lines and offering as the inducement an additional extensive land grant through an undeveloped country, every acre of which was in the possession of and inhabited by Indians and known as Indian lands.

There is nothing, however, in the terms of the statute, or the peculiar circumstances surrounding its enactment, which would seem to exempt the application of the usual rules heretofore applied by the Supreme Court in construing statutes of a similar character. It comes within the purview of what are commonly designated "land grant acts;" its purpose was the same, though worded in a way to meet the exigencies of the then situation of the parties. The Supreme Court, in a long line of decisions extending over the entire range of land grant legislation in aid of railroads, has uniformly held that grants of this description are to be construed most strongly against the grantee; that nothing passes except by the explicit terms of the grant, keeping in mind that the conveyance is by act of Congress, which is always susceptible to a construction in consonance with legislative intention. (The Dubuque and Pacific Railroad Company v. Litchfield, 23 How., 66; Slidell v. Grandjean, 111 U. S., 437; Rice v. R. R. Co., 1 Black., 360; Leavenworth R. R. v. United States, 92 U. S., 733, 739.)

In the last cited case, wherein a grant through Indian lands was directly involved, Mr. Justice Davis used this language in reference to its construction:

"This grant, like that to Iowa, was made for the purpose of aiding a work of internal improvement, and does not extend beyond the intent it expresses. It should be neither enlarged by ingenious reasoning nor diminished by strained construction. The interpretation must be reasonable, and such as will give effect to the intention of Congress. This is to be ascertained from the terms employed, the situation of the parties, and the nature of the grant. If these terms are plain and unambiguous there can be no difficulty in interpreting them; but if they admit of different meanings—one of extension and the other of limitation—they must be accepted in a sense favorable to the grantor; and if rights claimed under the Government be set up against it they must be so clearly defined that there can be no question of the purpose of Congress to confer them. In other words, what is not given expressly or by necessary implication is withheld."

Subsequently, in Winona & St. Peter R. R. Co. v. Barney (113 U. S., 625), Mr. Justice Field, in construing certain acts granting public lands to the State of Minnesota to aid in the construction of railroads, condensed in a few words the rule directly applicable to the present case: "The solution of these questions depends of course upon the construction given to the acts making the grants, and they are to receive such a construction as will carry out the intent of Congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyance. To ascertain that intent we must look to the condition of the country when the acts were passed as well as to the purpose declared on their face and read all parts of them together."

The courts have uniformly held in construing land-grant legisla-

tion, where the donation is a portion of the unencumbered public lands of the United States, that the grant was in præsenti to take effect upon the specific tracts when the line of the road is located; the grant then becomes certain and reaches back to the date of the act, having been a float until the line of the road is definitely fixed.

In construing grants cum onere, especially where the outstanding title or encumbrance was the Indian right of occupancy, a different rule has obtained and it would be difficult to say from a review of the authorities that the grant in each instance was in præsenti subject to the encumbrance. The Congress respecting legislation wherein Indian lands and reservations were known to have been invaded by land grants has almost uniformly provided specifically as to them, either obligating itself to extinguish the title, as it did in the Pacific railroad grants and other acts of similar character, or withholding the attachment of the grant until the Indian title has been extinguished. The Indian lands were, in the absence of express words of reservation, excepted from the operation of the grant by the general provisions found in all land-grant acts reserving lands previously disposed of by the United States by preemption or homestead entries or for any other purpose whatever. In the Leavenworth case (supra) the Supreme Court held that even in the absence of such reservation title would not attach to lands of this character. In the acts of March 3, 1857 (11 Stat., 196), July 1, 1862 (12 Stat., 491), July 2, 1864 (13 Stat., 364), July 2, 1864 (13 Stat., 367), July 25, 1866 (14 Stat., 236), July 26, 1866 (14 Stat., 289), where it was apparent that the line of the railroad must pass over Indian lands, express provisions were made respecting their reservation and the extinguishment of title. In all these instances cited above the United States either withheld the grant until the Indian title was extinguished, or expressly agreed to extinguish it for the purposes of the act. In Buttz v. Northern Pacific Railroad (119 U. S., 55) the Supreme Court held that the grant although through Indian lands was in præsenti passing the fee subject to one condition only. In the Buttz case, however, there was an express agreement to extinguish the Indian title. In the cases where no such express obligation rested upon the Government it has been settled beyond dispute that the grant of Indian lands is in the nature of a float conditioned upon the extinguishment of Indian title, the time, manner, and conditions of extinguishing such Indian title resting exclusively in the United States free from interference or contest by private parties. (Buttz v. Northern Pacific Railroad, supra; St. Paul, etc., Railway Co. v. Phelps, 137 U. S., 528-541.) It may then, we think, be asserted that the general rule respecting the construction of land grant acts rests primarily in the intent of the Congress in the passage of the law, and whether the title conveyed was one præsenti, futuro, or a conditional promise to convey must be ascertained by taking into consideration the circumstances of the transaction, the condition of the country, and the situation of the parties at the time of the donation. The general rules as to statutory construction prevail; for while the act is treated as a conveyance it is no less a law of the United States and as such subject to the ascertainment of legislative intent.

The Indian title was one of occupancy, the fee was in the United States, and the right of conveyance was limited to the United States or to others by their express consent. This rule has prevailed since the first litigation involving the subject and has never been departed from in any case. (Johnson v. McIntosh, 8 Wheat., 543; Jones v. Meehan, 175 U. S., 1; United States v. Winans, 198 U. S., 371.) While the Indian title was limited to the use and occupation of the lands and they were held in communal ownership, still it was such a title as the United States, in theory at least, fully respected and generally protected in its dealings with the respective tribes. The question of Indian title and Indian rights has been so frequently before the courts that it is needless to multiply citations supporting this contention.

The statute of 1866, passed as it was at the close of the war, evidently induced in part at least by the limited transportation facilities available to the Government during that crisis, sought to promote the construction of an extensive railroad line connecting the South with the East and West. In the consummation of the project and in the interest of time, the Government availed itself of the existence of three railway company-s, all of which were incorporated and pursuing a course directly in harmony with the purposes of the act. The country through which the major portion of the line must pass was Indian country in the possession of the Indians and had been for many years. The Creek Indians acquired their lands in Indian Territory in 1834, the Choctaws in 1830, and the Cherokees in 1828. They had been removed in accord with treaty stipulations, by the terms of which each tribe had ceded to the Government vast areas of land in the more populous East in exchange for these lands in the West. No doubt at the time of their removal the Government thought they had selected for the Indians a new habitat ideal in nature and extent; the country was a vast wilderness, absolutely undeveloped and then considered beyond the range of immediate settlement by the whites. The United States at this time and at the time of the passage of the act of July 25, 1866, treated Indian tribes as a dependent sovereignty under the supervision, guardianship, and control of the United States, but still accorded them sufficient autonomy to regulate their own tribal affairs and enforce their own peculiar tribal laws and customs. Innumerable treaties were made with the representatives of the tribes; the negotiations therefor were as solemnly carried on as with a foreign nation. The title to and dominion over their tribal lands was accorded the same respect as though possessed in fee simple, and the United States always, without a single exception brought to our attention, either purchased the Indian land for a money consideration or ceded public lands in exchange for those acquired. It was the policy of the Government in 1866 to acquire Indian lands wherever it could in the interest of civilization, and to remove the Indian to some distant reservation carved out of other public lands. The presence of so many Indian tribes in the western country was the result of this policy, and the United States no doubt anticipated, and had a right to anticipate, that such a course might follow in reference to the lands granted in the act of July 25, 1866. Whenever Indian tribal lands were ac-

quired by treaty or otherwise they were made part of the public domain and thrown open to settlement by preemption and homestead entries.

What was the situation of the parties at the time? All but one of the tribes occupying the lands in issue had joined the Confederacy during the war; it therefore became necessary to readjust their tribal status. The Government by three separate treaties, signed April 28, 1866 (14 Stat., 769), June 14, 1866 (14 Stat., 785), and July 19, 1866 (14 Stat., 799), covenanted, among other things, to secure said Indians in their title to their lands, and that whenever it was for their best interests the same would be allotted in severalty among them. These treaties, antedating the granting act here in issue but a few days, assuredly negative a governmental intention to grant to another a right just previously given under solemn treaty stipulations and at a time when the making of Indian treaties prevailed in the Government's intercourse with the Indians. The inference is irresistible; if otherwise, we must challenge the good faith of the United States in a transaction involving national honor. The United States could not grant the lands and respect the treaties unless it interposed conditions; the claimant company was not ignorant as to the situation. The United States did not agree to extinguish the Indian title; it had too recently confirmed it; nothing was left for the United States to do but what it did do. By the ninth section of the act, in language clearly prospective, it expressly annexed two conditions either one of which might defeat the grant, and in so doing followed its long continued Indian policy and its land-grant policy of only granting absolutely public lands to aid in the construction of railroads. The United States had the absolute power to grant these lands, but certainly not the disposition so to do. That they stood in a different position in reference to them is clearly indicated by the anomalous provisions of the act and their failure to assume the responsibility of extinguishment of title.

Subsequent to the passage of the act a different policy was inaugurated by the United States with respect to Indian tribes and tribal lands. Being substantially contemporaneous with the act, it may have then been anticipated. In 1871 the United States discontinued its recognition of Indian tribes as dependent sovereignties and the Congress assumed control. Treaties were no longer negotiated, and a comprehensive scheme was adopted involving the ultimate dissolution of the tribes, the allotment of their lands, and the citizenizing of the individual Indian. The western country was rapidly becoming more populous, settlements of considerable size were being erected, public lands were enhancing in value, and the demand therefor rapidly increasing. Territories were seeking admission into the Union, and Indian reservations, usually considered a menace to great advancement, were condemned by the public sentiment of the times. The Indians tribes themselves were becoming more and more adverse to continued removals and the Government finding it more than difficult to find new locations out of the public domain upon which to relocate them.

In 1884 (23 Stat., 96) an Indian residing on the public lands of

the United States was permitted to avail himself of the homestead laws.

In 1887 (24 Stat. L., 388) a most comprehensive law was passed providing for the allotment of Indian lands in severalty to Indian tribes residing on Indian reservations, and conferring on them the rights of citizenship. This statute did not reach the Indian tribes concerned in this suit; the reason therefor will appear hereafter. In 1889 (25 Stat. L., 783) a United States court was established in Indian Territory and its jurisdiction defined. In March, 1889, the entire western half of Indian Territory was ceded to the United States by the Indians then in possession thereof, out of which lands the Territory of Oklahoma was established in 1890. In fact, legislation too extensive to review was enacted at each session of the Congress tending toward the plainly expressed purpose to ultimately discontinue the previous relationship of the United States toward its Indian tribes. (Lone Wolf v. Hitchcock, 187 U. S., 553, 25 Stat. L., 642).

In March, 1893 (27 Stat. L., 645), by the sixteenth section of the general appropriation act for the Indians, the Congress provided for a commission to negotiate with the Creeks, Chickasaws, Choctaws, and Cherokee Indian tribes—tribes exempt from the act of 1889, supra, and the tribes whose lands are concerned in this suit—looking toward a dissolution of their tribes and a cession or allotment in severalty among them of their lands. While the expressed purpose of the law was to ultimately create a State of the Union out of the territory inhabited by the Indian tribes, it likewise was in entire accord with the general Indian policy of the Government. The commission appointed under this act, commonly known as the Dawes Commission, proceeded to the negotiations with the Indians and finally, after several years, secured agreements from the respective tribes as to the terms and conditions upon which they would willingly submit to a disposition of their landed interests. The Creek agreement was ratified by the Congress in 1901 (31 Stat. L., 861), the Choctaw and Chickasaw agreement in 1902 (32 Stat. L., 641), and the Cherokee agreement in 1902 (32 Stat. L., 716). Under these agreements the lands of the tribes mentioned were allotted to them in severalty, with certain exceptions as to town sites, school and church lands, etc. Some wholesome and precautionary reservations were made of mineral lands, but the entire body of Indian lands, with these exceptions, because the individual property of the individual Indian in severalty, being conveyed to the allottee by the joint act of the Indian and the Government.

While in a strict and technical sense the possessory title of the Indians was by this legislation extinguished, the United States was not the beneficiary; no provision of the law vested in the Government the united title of itself and the Indians. The transition was directly the opposite; the Government divested itself of whatever title it possessed and by a united conveyance merged the lesser and the greater estate in the allottee. The Indian title was only extinguished in the sense that the Indian acquired the outstanding title of the Government and by this act merged a possessory right into a fee simple. The Indian continued in possession. It is true his estate

was partitioned and his possession limited by metes and bounds, and the communal ownership of the lands destroyed, but the United States did not at any time by any provision of the law acquire the Indian title or any dominion over the lands which it did not already possess before the transaction. It was not the extinguishment contemplated by the act in order to vest title by its terms.

What was intended by the proviso to section 9 of the granting act: "Provided, That said lands become a part of the public lands of the United States"? The usual office of a proviso to a statute is too well known to require repetition. If the term "public lands," as used in the statute, is to receive the meaning accorded it in treaties and public laws, it means "such land as is subject to sale or other disposal under general laws." (Newhall v. Sanger, 92 U. S., 761-763; United States v. Thomas, 151 U. S., 577-583; Northern Lumber Co. v. O'Brien, 139 Fed. R., 616.) It has been suggested that the extinguishment of the Indian title and the lands becoming public lands are synonymous terms and that the lands having been public lands previous to Indian occupancy, nothing afterwards supervened to change their character, except the incumbrance of the Indian title. The contention is in a measure correct, but the subvention of Indian title by means of treaty stipulation, a contract equally as sacred as the act of July 25, 1866, and for which a consideration proportionately as great passed, changed the character of the lands; they were no longer part of the public domain, subject to disposal under general laws, and in the absence of express and explicit language did not pass under land grant laws, even though not expressly reserved. It did not require a public survey to make them public lands, and upon the extinguishment of the Indian title if within the intent of the act they would have passed under the grant, for the railroad had long since definitely located its line of road.

The proviso was inserted for some purpose; it was not surplusage; it had some definite intent. In view of what has been said, it seems to have met a situation, whether anticipated or not, in strict accord with the policy of the United States in its relations to Indian tribes. The United States in the act making the grant to claimant company was in no position to convey immediate title; it did not even know when, how, or in what manner it might ever convey the same, and it wisely circumscribed the grant by conditions, not only that the Indian title should be extinguished, but that the lands should again become part of the public domain, owned absolutely by the United States, free from incumbrance of any kind or character, and subject to its disposition without invading the rights of others or violating its obligations with respect thereto.

It is not to be presumed that the United States would, by treaty stipulations, provide lands for tribal Indians, an unlettered and dependent people, and at the same time enact legislation which by its express terms would incapacitate it from disposing of said lands in the very manner they had expressly agreed to do. The successive acts by which the Indians received their allotments in severalty were, in effect, agreements between the Indians and the United States. The Indians did not cede title to the United States, and, if they did,

it was in pursuance of an agreement not to throw said lands open to public settlement, nor to allow the United States the absolute power of disposal, but to reconvey them to the Indians in severalty, making them in no event public lands in the sense in which that term is used in referring to that particular portion of the landed possessions of the United States. If they became public lands and claimant company's grant attached, then the United States, in violation of express contracts, gave to the claimant company over 3,000,000 acres of land belonging to the respective tribes concerned herein, which some of them had occupied and owned, as Indian tribes owned land, since 1828. That it did not so intend is evidenced by the twenty-seventh section of the act of April 26, 1906 (34 Stat., 148), wherein it is expressly stated that said lands shall not become public lands nor the property of the United States. It is more consistent with the circumstances of the grant to say that the proviso was inserted for the purpose of enabling the United States to discharge its obligations under the treaties of 1866 by distinguishing between lands which are simply the property of the United States and its public lands donated to settlers and others for the purposes of internal improvements. As before observed, "if rights claimed under the Government be set up against it, they must be so clearly defined there can be no question of the purpose of Congress to confer them." (Leavenworth case, supra.)

The Congress knew that in the course of time Indian tribal relations and Indian tribal lands must be segregated; that the existence of a large body of people holding immense areas of lands, free from local taxation, living thereon as a distinct and separate community, must yield to an advancing civilization. Governmental purposes required their absorption into the body politic of the nation, aside from their personal welfare. The Congress, knowing the difficulties attendant upon the extinguishment of Indian title, and the acquirement of their lands, was not willing to rest the grant of 1886 upon that contingency alone, for it was certain to happen in one way or another, but added as precautionary legislation a clause which in no wise limited them in extinguishing Indian title, but did exempt them from liability if forced to extinguish it in a manner whereby the United States acquired nothing in property. If the proviso was meaningless, merely descriptive in character, the United States placed itself in a position whereby it must assume a great liability to the claimant company or abandon its right to deal with the Indians as public policy and the sentiment of the time demanded. The Government was willing, and by the language of the act intended, to grant the claimant the lands mentioned in the act if they could by discharging their obligations to the Indians acquire this land as it usually acquired other public lands, in which event it could comply with the statute without loss to itself or incurring liabilities enormous in extent. We can not presume that the Congress did not know the extent of its liability if it rested the grant herein upon the first condition alone.

It is urged, however, that the particular portion of lands falling within the grant which were not allotted to the Indians are subject to the claimant company's grant. It is true that quite a significant

portion of the Indian Territory was not allotted to the individual Indians. Town-site commissions were appointed to survey, plat, and dispose of certain quantities of land for town-site purposes. The coal, asphalt, and mineral lands were segregated from allotment and leased and disposed of under salutary provisions of the law to secure their full value to the Indians; in fact, provision was made for the disposition of all surplus lands over the allotments. The mode prescribed for the disposition of these lands was not essentially different, in so far as transfer of title is concerned, from that used in the case of allotment. If they ever became public lands within the meaning of the statute so did the great body of lands allotted.

The United States and the Indian tribes joined in conferring upon certain commissions, upon each of which both were represented, power and authority to lay out the town sites as therein provided, and dispose of the lots so platted at auction. Schools were to retain their locations by paying a certain amount for their lands. Cemeteries could be established by the town authorities upon certain terms and conditions. The leasing and sale of mineral lands was wisely lodged in the Interior Department. Churches were to receive their lands gratuitously. The United States had the option to purchase suitable lands for the location of courthouses, jails, and other public buildings—a rather novel provision if the lands were public lands of the Government—and finally, as provided in section 17 of the act approved April 26, 1906, supra, all the money arising from said sales, "or from any source whatever," was to be credited to said Indian tribes by the Treasury Department and thereafter paid to the Indians per capita. Public lands of the United States were not disposed of in this manner then, and they are not so disposed of now.

In pursuance of the general plan of allotment it was indispensable to take an equitable basis of distribution. In the agreements, ratified by Congress, it was fixed at a certain number of acres at a fixed price per acre and either the specified acreage was allotted or an increased or diminished allotment according to its appraised value. It was physically impossible to absorb the whole body of lands, even if desirable, and the surplus lands were disposed of with a view to continuing existing Indian towns and encouraging their enlargement. Indian villages had of course grown up in this large community; they were indispensable and the lands being held by communal title necessarily came within the Indian agreements with the United States. What has been said before applies to them; the United States never acquired title to them free from incumbrance; they were never conveyed or in any way ceded to the United States. The very terms of the agreement fix their status, and though disposed of to other than Indians no part of the consideration ever reached the Treasury as funds belonging to the United States. The United States in fact transferred its title to the Indian and permitted the Indian to transfer it to another. Lands allotted to intermarried whites and former negro slaves were in the same category. The status of these people having been fixed by Indian laws it was carried into the agreement as to allotment; they did not take by preemption or homestead entries or by any manner similar to the ones used in disposing of public lands.

Again it is insisted that there rested upon the United States an implied obligation to extinguish the Indian title so the grant might attach; that the United States having prevented and made impossible of performance the condition it agreed to perform must respond in damages. It is indisputable that authority and power to deal with Indian tribes and Indian lands was lodged exclusively in the Government. The time and manner of disposition was exclusively for the United States, free from interference at the suit of private parties. If, then, an implied obligation rested upon the United States in this instance it was equivalent to saying we will extinguish title and make said lands public lands of the United States, and the language of the act as qualifying terms was meaningless. There would have been no distinction between this grant and other grants wherein the United States expressly agreed to extinguish Indian title. The case is different from an ordinary executory contract where one party refuses or renders himself unable to perform a condition he impliedly engaged to perform. It can not be asserted that the United States impliedly engaged itself to extinguish the Indian title within a reasonable time; that was a matter within their exclusive right to determine; it could have continued the reservations indefinitely and no liability attached. It might never have extinguished Indian title and still be exempt. The condition was not one certain of performance; it was expressly contingent, and its performance was reserved exclusively to the grantor indeterminately.

The United States recognized in the second condition its right to extinguish the Indian title without incurring liability. If responsible obligations are to be implied the act simply postponed what was inevitable, and the claimant company was somewhat tardy in waiting 42 years to assert its claim for damages for nonperformance of a condition within the power of the defendants to perform, and that within a reasonable time.

The Congress by the act of 1866 did not do a "vain thing." The treaties with the Creeks, Cherokees, Choctaws, and Chickasaws consummated in 1866 reserved to the United States the right under certain conditions to grant extensive rights of way for railroad purposes through their lands. The act of 1866 transferred in almost identical terms this right to the successful competitor under the eleventh section of the act, and in addition thereto granted extensive areas of land in the State of Kansas, all of which was acquired by the claimant company. There was no possible way for the claimant company, or either of its competitors, to connect their railroad lines and reach the coast via Preston (now Denison), Tex., except by permission of the Congress to pass through Indian Territory. The keenness of the competition and the subsequent disputes relative thereto appearing in claimant's exhibits to its petition indicate the zeal of the competitors.

The claimant company accepted the grant with the conditions imposed, conditions which clearly expressed and intended to express the uncertainty of its complete realization. The United States from its very beginning had regarded its treaties with the Indians, and the court can not presume, nor in the absence of express language indicating an intent so to do, enlarge the terms of the granting act to

cover a vast area of land solemnly dedicated at the time of the grant to Indian tribes and for Indian purposes. If the United States so intended, apt language would have been employed, and terms of conveyance used in acts of similar character would have been used, leaving no doubt as to its purposes or what lands passed by the grant. Following the rules of construction heretofore set forth, we think the demurrer should be sustained. It is so ordered.

Claimant Company granted leave to amend petition.

Filed December 4, 1911.

BY THE COURT.

Concurring Opinion by Howry, J., Filed Dec. 4, 1911.

HOWRY, *Judge*, delivered the following opinion:

The magnitude of this cause and the importance of the issues raised by demurrer to the plaintiffs' petition of 698 printed pages of allegation and exhibit are causes sufficient to warrant full expression of opinion by any or all responsible for the result. Especially is this so because of the statement contained in the brief of one of the learned counsel that it had been said that a suit for more than $61,000,000 never had been and never could be carried through, followed by the further declaration that it had been frequently stated that if this were a suit between private parties for a moderate amount there could be no question of its receiving favorable consideration. But who said it and by what authority? And why should the courts be thus discredited? If the size of the claim could have anything to do with the result, the sooner this court should retire from business the better for the citizen.

But any court must pause in considering so enormous a demand and be well assured of its merit before saying there is liability. Certainly statements in the nature of advance criticism can not have the effect of preventing the proper judgment in the discharge of an unavoidable duty as that duty is understood.

Whilst concurring with many of the views expressed in that which precedes this opinion my own views are submitted along somewhat different lines as covering my reasons for sustaining the demurrer to the petition.

Four great estates lying in what was formerly known as the Indian Territory (but now the State of Oklahoma) are involved. The plaintiff company, as the successor of the Kansas & Neosho Valley Railroad claims a grant in præsenti of over 3,000,000 acres of land covering 4,866 sections, or 135 solid townships, at the rate of 12,800 acres to the mile through 243 miles of territory beginning at the southern line of Kansas and extending to the northern line of Texas. The area attached to and with whatever passed, according to the petition, embraced alternate sections on each side of the railroad. If anything was granted, it was in the nature of a float until the lands were surveyed as public lands of the United States. Upon such survey, it is claimed, the grant specifically attached to every odd-numbered section within the 20-mile limit and the case is presented on the theory that by the doctrine of relation when the road was located, built, and the lands were surveyed, the title acquired became

specific, thereby reaching back to the date of the grant. This immense domain is valued at $20 an acre, for which a money judgment is asked of and from the defendants for something over $61,000,000.

Congress by an act approved July 25, 1866, 14 Stat., 236, granted, for the benefit of the original company, certain public lands in the State of Kansas. By section 1, ten alternate sections of land on each side of the road to every mile, to be selected within 20 miles of the railroad, were granted to the governor of that State to aid in the construction of the Kansas & Neosho Valley Railroad, and in the event of such lands having already been pre-empted, it was provided that lieu lands should be selected likewise within the 20-mile limit. There was attached to this grant a proviso:

That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby, reserved and excepted from the operation of this act, except so far as it may be found necessary to locate the route of said road through such reserved lands, in which case the right of way, 200 feet in width, is hereby granted, subject to the approval of the President of the United States: And provided further, That said lands hereby granted shall not be selected beyond 20 miles from the line of said road.

Section 2 provided that the sections and parts of sections remaining should not be sold for less than double the minimum price. Section 3 provided for the free transportation of Government troops and the terms upon which the lands should be patented to the railroad and that if the road should not be completed within two years the unpatented lands should revert. Section 4 provided that as soon as the company should file its maps designating the route the lands should be withdrawn from the market. Section 5 provided for the transportation of mails. Section 6 granted a right of way through the public lands 100 feet wide, with grounds for station buildings and material for construction from the adjacent lands. Section 7 provided:

That the acceptance of the terms, conditions, and impositions of this act by the Kansas Valley road shall be signified in writing, * * * which acceptance shall be made within one year after the passage of this act, and not afterwards, and shall be deposited with the Secretary of the Interior.

The foregoing sections relate to the grant of public lands exclusively in Kansas and have no relation to grants of lands within the Indian Territory.

The sections which relate to the construction of the road through the Territory deal[1] with lands not public lands at the time of the conditional grant. The four sections are so entirely different in scope and effect they are set forth verbatim in the footnote.[1]

[1] SEC. 8. *And be it further enacted*, That said Kansas and Neosho Valley Railroad Company, its successors and assigns, is hereby authorized and empowered to extend and construct its railroad from the southern boundary of Kansas south, through the Indian Territory, to Red River, at or near Preston,

At the time of the approval of the granting act certain roads were being constructed in Kansas, viz: Atchison, Topeka & Santa Fe Railroad, the Leavenworth, Lawrence & Fort Gibson Railroad, the

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in the State of Texas, so as to connect with the railway now being constructed from Galveston to a point at or near Preston, in said State, and the right of way through the Indian Territory, wherever such right is now reserved or may hereafter be reserved to the United States by treaty with the Indian tribes, is hereby granted to said company, to the same extent as granted by the sixth section of this act, through the public lands; and in all cases where the right of way, as aforesaid, through the Indian lands shall not be reserved to the Government, the said company shall, before constructing its road, procure the consent of the tribe or tribes interested, which consent, with all its terms and conditions, shall be previously approved and endorsed by the President and filed with the Secretary of the Interior.

SEC. 9. *And be it further enacted*, That the same grants of lands through the Indian Territory are hereby made as provided in the first section of this act, whenever the Indian title shall be extinguished by treaty or otherwise, not to exceed the ratio per mile granted in the first section of this act: *Provided*, That said lands become a part of the public lands of the United States.

SEC. 10. *And be it further enacted*, That said Kansas and Neosho Valley Railroad Company, its successors and assigns, shall have the right to negotiate with, and acquire from any Indian nation or tribe, authorized by the United States to dispose of lands for railroad purposes, and from any other nation or tribe of Indians through whose lands said railroad may pass, subject to the approval of the President of the United States, or from any company or parties incorporated or authorized for such purposes, by such nation or tribe, or which such parties may have acquired under the laws of the United States.

SEC. 11. *And be it further enacted*, That any railroad company chartered under any law of the United States, or of the State of Kansas, which may have been heretofore or shall hereafter be recognized and subsidized by any act of Congress of the United States, may connect, unite, and consolidate with this railroad company, after the same shall be located to the valley of the Neosho River, upon just, fair, and equitable terms, to be agreed upon between the parties, and shall not be against the public interest or the interest of the United States; nor shall any road authorized to connect as aforesaid charge the road so connecting a greater tariff per mile for freight or passengers than is charged for the same per mile by its own road: *And provided further*, That should the Leavenworth, Lawrence and Fort Gibson Railroad Company, or the Union Pacific Railroad Company, Southern Branch, construct and complete its road to that point on the southern boundary of the State of Kansas where the line of said Kansas and Neosho Valley Railroad shall cross the same, before the said Kansas and Neosho Valley Railroad Company shall have constructed and completed its said road to said point, then and in that event the company so first reaching in completion the said point on the southern boundary of the State of Kansas shall be authorized, upon obtaining the written approval of the President of the United States, to construct and operate its line of railroad from said point to a point at or near Preston, in the State of Texas, *with grants of land according to the provisions of this act*, but upon the further special condition, nevertheless, that said railroad company shall have commenced in good faith the construction thereof before the said Kansas and Neosho Valley Railroad Company shall have completed its said railroad to said point: *And provided further*, That said other railroad company, so having commenced said work in good faith, shall continue to prosecute the same with sufficient energy to insure the completion of the same within a reasonable time, subject to the approval of the President of the United States: *And provided further, That the right of way through private property, when not otherwise provided for in this act*, or by the law of any State through which the road may pass, shall be obtained by said Kansas and Neosho Valley Railroad Company, or either of the other companies named in this act, in accordance with the provisions of section three of an act to amend an act entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes," approved July first, eighteen hundred and sixty two.

Union Pacific, Southern Branch, Railroad (now the Missouri, Kansas & Texas), and the Kansas & Neosho Valley Railroad. Plaintiff company, it was subsequently shown, was the first to reach the designated point on the southern boundary of Kansas and the consideration is rested upon the language that when the road was the first to complete, the grant or promise of the lands became binding and irrevocable subject to the conditions expressed in section nine. Meantime the company had negotiated with and secured the consent of the Indian nations to the right of way through their lands, as required by section 8 of the granting act. Thereupon the company began the work of construction and completed its line to Denison, Tex., within the required time and has since operated the line.

At the time four Indian nations possessed and occupied the lands through which the road was authorized to be constructed, to wit: The Muskogee Nation, commonly known as the Creeks, the Cherokees, the Choctaws, and Chickasaws. These people were living on lands set apart to them as a permanent home under treaties with the United States. The Muskogee Nation, or Creeks, acquired title to their lands in the Indian Territory by treaty April 12, 1834, 7 Stat., 417. Their title was defined by the natural landmarks described in article 2. Their conveyance was by patent provided for by article 3, as follows:

The United States will grant a patent, in fee simple, to the Creek Nation of Indians for the land assigned said nation by this treaty or convention, whenever the same shall have been ratified by the President and Senate of the United States, and the right thus guaranteed by the United States shall be continued to said tribe of Indians so long as they shall exist as a nation and continue to occupy the country hereby assigned them.

The Muskogees (or Creeks) received a patent to their lands August 11, 1852.

The Choctaw Nation went into the possession of their lands in the same Territory by virtue of a treaty with the United States, known as the Dancing Rabbit Creek treaty, dated September 30, 1830, 7 Stat., 332. Their possession was described by metes and bounds and was guaranteed to the Choctaws by article 2, as follows:

The United States under a grant specially to be made by the President of the United States shall cause to be issued to the Choctaw Nation a tract of country west of the Mississippi River in fee simple to them and their descendants to inure to them while they shall exist as a nation and live on it.

Subsequently, March 23, 1842, the United States issued their patent to the Choctaw Nation in accordance with section 2 of the treaty between the parties. Subsequent to that time, January 17, 1837, the Choctaws and Chickasaws entered into "articles of convention and agreement," 11 Stat., 573, by article 1 of which it was provided:

It is agreed by the Choctaws that the Chickasaws shall have the privilege of forming a district within the limits of their country, to be held on the same terms that the Choctaws now hold it, except the right of disposing of it, which is held in common with the Choctaws

and Chickasaws, to be called the "Chickasaw district of the Choctaw Nation."

Later, on June 22, 1855, another treaty was entered into between the United States and the Choctaw and Chickasaw Tribes, 11 Stat., 611, by which the boundaries of the Choctaw and Chickasaw country were defined and secured and guaranteed "to the members of the Choctaw and Chickasaw Tribes, their heirs and successors, to be held in common" and to "revert to the United States if said Indians and their heirs become extinct or abandon the same."

The Chickasaws were removed to these lands by the United States. Beginning with the treaty between those people and the United States of October 20, 1832, 7 Stats., 382, known as the treaty of Pontitoc Creek, we find the initial steps taken for their removal. They went west seeking a permanent home and it was so expressed to them by the Government. For a consideration the Chickasaw Nation ceded to the United States all the land which they owned in Mississippi. By a supplemental treaty proclaimed May 24, 1834, known as the treaty of Washington, the original treaty was modified with respect to the disposition of certain reservations in Mississippi, but the general scheme of removal was carried out. The tribe subsequently, in 1837, obtained title to land in the Choctaw country in pursuance of the original intent between the Chickasaws and the Government. The United States supervised and sanctioned the treaty between the Choctaws and the Chickasaws. The purpose then was unqualified as to any possibility of the removal of any of these people from the country where they were located west of the Mississippi.

The title of the Cherokees to the portion of their lands involved in this case was first acquired under treaty with the United States May 6, 1828, 7 Stat., 311. Article II was a guaranty to the Cherokees for possession forever of 7,000,000 acres of land. This guaranty was to "the Cherokees." And in addition to the guaranty of 7,000,000 acres the United States further guaranteed "to the Cherokee Nation" a perpetual outlet west. On February 14, 1833, a supplemental treaty was entered into whereby the United States reaffirmed the foregoing grant, 7 Stat., 414, and "to possess the Cherokees, to guarantee to them forever the land therein described." Subsequently, December 29, 1835, the treaty of New Echota was made with the Cherokees residing east of the Mississippi whereby the United States guaranteed and secured to be conveyed by patent the home tract and the outlet covenanting "to convey to the said Indians and their descendants by patent in fee simple an additional tract of land" describing a tract of 800,000 acres. By the third article of this treaty it was agreed that there should be included in one patent to be executed to the Cherokee Nation all the land mentioned according to the provisions of the act of May 28, 1830, 4 Stat., 411. This act was "An act to provide for an exchange of lands with the Indians residing in any of the States or Territories and for their removal west of the river Mississippi." By section 3 of that act it was provided that—

In the making of any such exchange or exchanges, it shall and

may be lawful for the President solemnly to assure the tribe or nation with which the exchange is made, that the United States will forever secure and guarantee to them, and their heirs or successors, the country so exchanged with them; and, if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same: Provided always, That such lands shall revert to the United States if the Indians become extinct or abandon the same.

By section 7:

Provided, That nothing in this act contained shall be construed as authorizing or directing the violation of any existing treaty between the United States and any of the Indian tribes.

On December 31, 1838, a patent was issued by the United States reciting provisions of the treaties of 1828, 1833, and 1835 in regard to the grants of such lands.

After the close of the war between the States treaties of amnesty between the United States and the tribes whose lands are here affected were proclaimed as follows, viz: With the Choctaws and Chickasaws, proclaimed with amendments July 10, 1866, 14 Stat., 769; with the Creeks, proclaimed with amendments August 11, 1866, 14 Stat., 785; and with the Cherokees, proclaimed August 11, 1866, 14 Stat., 799. In this latter treaty the amendments offered in the Senate were not accepted by the Indians until July 31, 1866. With the Creeks, the Choctaws, and Chickasaws the amendments were accepted in July, 1866.

Previous to the passage of the act under which plaintiff claims and subsequently, other acts had been passed for the construction of railroads southward from Kansas. Under its original name of Union Pacific Railway Company, Southern Branch, it was granted lands by acts of Congress of March 3, 1863, July 1, 1864, and July 26, 1866. The first named of these acts was for the grant of land to the State of Kansas for aid in the construction of certain railroads, 12 Stat., 772. Among the railroads for whose benefit aid was granted by this act was a line extending from Atchison via Topeka through Kansas in the direction of Santa Fe, N. Mex., with a branch from where the road crossed the Neosho in Kansas down the valley of that name to a point where the railroad, also aided by said act, extended from Leavenworth in the direction of Galveston Bay, in Texas. This was the route substantially covered by the original charter. On July 2, 1864, Congress passed another act making additional grants of land in Kansas to aid in the construction of railways. On March 19, 1866, the Atchison, Topeka & Santa Fe Railway and plaintiff entered into an agreement whereby the Atchison Co. assigned all its rights in and to the lands granted by the act of March 3, 1863, and of July 1, 1864, as to the line from Fort Riley down the Neosho Valley, and known as the Neosho Valley Branch. Then came the act of July 25, 1866, supra, and on July 26, 1866, Congress passed another act granting lands to the State of Kansas for the construction of the Southern Branch of the Union Pacific. These lands so granted inured to the benefit of the plaintiff, and were, as alleged in the petition, parts of a general scheme and

purpose, subject to the will of Congress, as I think, with respect to the outstanding claims of others.

These acts of Congress of March 3, 1863, 12 Stat., 772, July 1, 1864, 13 Stat., 339, and July 26, 1866, 14 Stat., 289, granted lands which the Supreme Court construed to be acts in pari materia. Kansas City, Lawrence and Southern Kansas R. R. Co. v. Attorney General, 118 U. S., 682. There was no occasion for the appellate court to allude to the lands occupied and held under treaties between the Government and the Indians, because the present controversy had not then arisen. But all these acts and Indian treaties must be considered together in disposing of the issues here to determine the meaning and intent of Congress with respect to the lands which now form the subject matter of this controversy, because they were all under executive and legislative consideration at the same time.

In the exercise of the political power over the civilized tribes as wards of the Government, Congress provided for the appointment of a commission, known as the Dawes Commission, to enter into negotiations with the civilized tribes for the purpose of extinguishing the national or tribal title, either by cession of some part of the soil or by allotment, and division among the Indians upon the acceptance by the Indians of the terms imposed. The national claim of title was superseded by the allotment of lands in severalty, and by subsequent legislation Congress declared "that the lands belonging to the Choctaw, Chickasaw, Cherokee, Creek, or Seminole Tribes upon the dissolution of said tribes shall not become public lands nor property of the United States, but shall be held in trust by the United States for the use and benefit of the Indians respectively comprising each of said tribes and their heirs."

Pending the allotment of the lands in severalty the plaintiff company gave formal notice of its claim to the land by virtue of an act approved July 25, 1866. (14 Stat., 236.) It claimed that by the performance on its part of the conditions set forth in the act mentioned an express contract founded upon the said act had been created whereby the company had acquired the title in fee simple to the lands, subject only to the communal, possessory, or usufructuary rights then existing in the four nations in occupancy. It is contended that as the national tribal title of occupancy existing at the date of the grant became extinguished the company's title took immediate effect by relation as of the date of the alleged grant, and thereupon became entitled to patents.

As an alternative proposition to that alleging breach of an express contract it is further alleged that even if this proceeding "be treated as a mere suit to recover the value of lands owned by the claimant and taken by the United States, it is an action upon an implied contract and one based on the Constitution." Thus, a grant in præsenti of such character as to entitle the plaintiff to immediate possession, as well as to patents to the lands described in the petition, is claimed under and by virtue of alleged express covenants as well (it is further contended) on the implied promise of the Government to pay for the lands on demand, which has found expression in the present proceeding, for a money judgment against the United States.

The demurrer to the petition is made by counsel to raise two questions:

(1) Whether the claim is within the jurisdiction of the court under the provisions of the Tucker Act.

(2) Whether the petition sets forth a cause of action.

The laws and the facts arising out of the allegations of the petition under the statutes and treaties affecting the issues are too intimately blended to deal separately with the matter of jurisdiction without going into the merits of the case so far as can be done properly on the demurrer.

There is authority for this course. Fauntelroy v. Lum, 210 U. S., 235. In Louisville Trust Co. v. Comingor, 184 U. S., 26, the court declared that the power to hear and determine a subject matter was limited in such various ways in many cases the matter of jurisdiction might depend on the ascertainment of facts involving the merits, and in that sense courts could exercise jurisdiction in disposing of the preliminary inquiry, subject to correction on a review where jurisdiction was erroneously retained by an adjudication on the merits.

But plaintiff objects to the consideration of anything in the nature of extraneous matter and seeks to restrict consideration of the case as made by the petition.

The office of a demurrer should not be undermined by the use of testimony of a documentary character which, according to the rules of law, need to be properly authenticated, but public acts and treaties affecting the issue at any stage of the proceedings can not be excluded from consideration at any time.

Eliminating certain documentary evidence offered by defendants to qualify or contradict the statements of the complaint because not proper to be considered on demurrer, all acts of Congress relating to the alleged grant and all public treaties affecting the Indian right can now properly be considered. Judicial notice must be taken not only of the legislation treaty agreements and contracts with all parties affected, but all matters of public history must be taken into account. The averments and exhibits of the petition require the court to take an unrestricted view of practically everything material in any stage of the case.

The general jurisdiction of the Court of Claims conferred by the act of March 3, 1887, 24 Stat., 505, gives the court authority to hear and determine:

(1) All claims founded upon the Constitution; or, upon any law of Congress except for pensions.

(2) Those founded upon any regulation of an Executive Department.

(3) Or those founded upon any contract, expressed or implied, with the Government of the United States.

(4) Or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress either in a court of law, equity, or admiralty, if the United States were suable.

For and against jurisdiction under the Tucker Act of 1887, 24 Stat., 505, a large number of authorities have been cited. In sup-

port of the demurrer defendants particularly rely upon the following: Langford's case, 12 C. Cls. R., 338; 101 U. S., 341; Bethlehem Steel Co. v. Same, 41 ib., 19, 205 U. S., 105; Hollister v. Benedict Mfg. Co., 113 ib., 59; United States v. Palmer, 128 ib., 262; Hill v. United States, 149 ib., 593; Schillinger v. Same, 155 ib., 163; United States v. Berdan Fire Arms Co., 156 ib., 552; Dooley v. Same, 182 ib., 222; Russell v. Same, 182 ib., 516; Bigby v. Same, 188 ib., 400; Harley v. Same, 198 ib., 229.

In support of the sufficiency of the allegations of the petition plaintiff relies upon the following, viz: Brown v. United States, 6 C. Cls. R., 171; United States v. Curtner, 38 Fed. Rep., 1; Choctaw Nation v. United States, 119 U. S., 1 et seq., United States v. Great Falls Mfg. Co., 112 U. S., 645; 16 C. Cls. R., 160; New York Indians v. United States, 170 U. S., 1 et seq.; United States v. Lynah, 188 U. S., 445; The Milliken Imprinting Co. v. United States, 40 C. Cls. R., 81; 202 U. S., 168; State of Kansas v. United States, 204 U. S., 331.

It would not be profitable to review the many cases relating to the jurisdiction under the Tucker Act of 1887. Several relating to the general jurisdiction of this court under the act mentioned, including a number of those cited by the respective counsel, were specifically considered in Lynah's case, 188 U. S., 445. It is enough now to say that some of the cases relied on relate to express contracts and some to the right of the parties to recover upon the implied promise to pay; some are for the taking of land for public improvements, while others relate to compensation for the alleged appropriation of rights under patents, while there are yet other cases of a class presenting questions of a character quite different from the case at bar.

It is true, as said by some of the counsel, that the case here is so unique that there is nothing like it to be found in the books. Yet in many respects it is a case which can not be regarded as so unusual that precedents can not be applied.

There is no room for any alternative proposition as upon an implied contract. It is a rule of ancient pleading sanctioned in modern practice that parties can not be bound by implied promises when express contracts have been made as to the same subject matter. Chitty said that this proposition was certainly sound law unless the express contract be rescinded or abandoned. So, where an express written contract exists the complaining party must declare upon the written agreement so long as the special agreement remains in force, and under such circumstances such party can not recover upon a quantum meruit. The principle has met the approval of the Supreme Court when it declared the Chitty rule that implied promises in law exist only where there is no express promise—expressum facit cessare tacitum. Hawkins v. United States, 96 U. S., 218.

Applying these principles, there is no implied contract, and the cause must stand on the alleged express agreement for whatever there may appear to be respecting a breach. If there is a breach, the action must only lie for that breach; but if there be no breach, no action will lie for the implied assumpsit until it be shown that the

parties have either abandoned the express agreement or have so rescinded or modified it as to give rise to a necessary implication.

In Harley's case, 39 C. Cls., 114, Nott, Ch. J., said that implied contracts are of two kinds. The first is where a man has tortiously taken property and the owner waives the tort and sues in assumpsit. In such cases there is no meeting of the minds. Such cases, said this court, rest upon the principle that if the owner chooses to waive the tort and sue for the money derived from his property in the defendant's hands, the defendant can not set up his own unlawful conduct as a defense. The second kind of implied contracts, continued the writer of that opinion, "is where the parties met and their meeting resulted in a wordless agreement."

But this is a suit against the United States first upon an express contract and as an alternative upon an alleged implied agreement. The double method of proceeding is inconsistent. If there was an express contract founded upon a law in favor of the company, the plaintiff not only does not abandon it, but stands upon what it says is an express agreement. If there was no express contract, it is not apparent how the jurisdiction can be asserted for the taking of the lands claimed, inasmuch as the action is against the Government and there is no implied promise to pay; but, according to the petition, an express promise on the part of the Government to do so.

Individuals may sometimes waive a tort and sue in assumpsit, but where there is a tortious taking by the United States the wrong can not be so waived as to warrant an action under the provisions of the Tucker Act. In so far, then, as this action rests upon the alternative proposition asserted as upon an implied promise the jurisdiction is wanting. Russell v. United States, 182 U. S., 530; Harley v. same, supra, 198 U. S., 234.

As to the second kind of implied contracts where parties have met but their meeting resulted in a wordless agreement, there can be no room for the statement that jurisdiction can be maintained under plaintiff's alternative proposition, because the company's entire case comes back to the express agreement. It is that which must be enforced, if anything can be.

No clearer statement can be found relating to jurisdiction than that stated in United States v. Jones, 131 U. S., 16, where the court said that the circuit and district courts had concurrent jurisdiction, within certain limits as to amounts, to render judgments on money demands, but the power of those courts was no broader than the jurisdiction of the Court of Claims to render judgments for the larger amounts of which this court has jurisdiction; and that "claims redressible in a court of law, equity, or admiralty may be claims for money only, or they may be claims for property for specific relief, according as the context of the statute may require or allow." Other cases practically repeat this phase of the matter under the provisions of the Tucker Act, viz.: United States v. Behan, 110 U. S., 338; United States v. Great Falls Mfg. Co., 112 Ib., 645; Hollister v. Benedict, 113 Ib., 67.

If, then, plaintiff's title became complete by the lawful merger of the Indian title with such reversionary interest as the railroad acquired from the United States—that is, if divesting the Government

of all its interest in the lands by the act of July 25, 1866, the United States lawfully extinguished the Indian titles and also converted the land now claimed into the public domain of the Government—the railroad interest became vested and there arose a breach of an express contract for the value of the land for which a judgment sounding in damages for money can be entered.

No question of tort is involved under the provisions of the Tucker Act if full and complete title became vested in the railroad by contract; or, in other words, if the railroad acquired such a title that the lands became a property right which the company could assert by due process of law at the time of the filing of the petition. There is thus presented the broad question as to whether the claim of the plaintiff be justiciable linked as this question necessarily is with the intent of Congress in the passage of the act upon which the claim of title is predicated and with the constitutional power and authority of Congress to make the allotments and reservations as appears to have been done. Assuming that the Government parted with the fee, the question is whether there was not yet left the transcedent power of the legislature to carry out contemporaneous obligations with others.

It is well to observe here that a claim against the United States for a specific amount of money which is not expressly or by necessary implication authorized by a valid enactment of Congress can not be said to be founded on the Constitution. Hooe v. United States, 218 U. S., 322. And where the United States have not acknowledged any right of property in a petitioner the case is one sounding in tort, of which this court has no jurisdiction under the act of March 3, 1887. Hill v. United States, 149 U. S., 593.

By the Constitution Congress became invested with the power to deal with the Indian tribes, and the question arises whether the courts can deny the validity of acts of Congress where, pursuant to treaties in existence at the time of the passage of the alleged granting act, the legislative body undertook to carry out the provisions of those treaties for the benefit of the then occupants of the lands. In other words, can it be said that the claim of the plaintiff is justiciable?

When the company proves, if it can prove, that the conditions imposed by the act of July 25, 1866, have happened there is jurisdiction to proceed as for a breach. The fulfillment of the conditions of the grant sufficiently acknowledges on the part of the United States plaintiff's right of property created by the grant, but otherwise not.

Here the Government does not claim to own the fee to the lands or to have any interest in them and in this respect the matter of tort is unlike Langford's Case, 101 U. S., 341, and unlike Hill v. United States, 149 U. S., 593. The rule deducible from these and other cases was stated in the leading case of United States v. Lynah, supra, where the court said that "if an officer of the Government takes possession of property under the claim that it belongs to the Government (when in fact it does not), that may well be considered a tortious act on his part," for the reason that there could be no implication of an intent on the part of the Government to pay for

that which it claims to own. In the present case the strong arm of the Government has been interposed for the protection of the wards of the nation and to carry out treaty rights contemporaneously made with the grant to the railroad (previously as well), conceding rights to the occupants of the land. This statement brings us to the allegations respecting the course of the Government in making the allotments and reserving by its other legislation other lands for the benefit of the occupants and the refusal of the defendants to make the lands public lands of the United States.

This phase of the matter will be understood better after considering the terms of the grant and the existing treaties together. The suggestion in its nature is jurisdictional to be sure, but does not involve defendants in anything tortious unless it be shown that the Government had no power to execute its treaties because of the grant.

All parties are agreed that section 9 is the vital section.

Plaintiff's contention is that upon the transfer of the tribal title to the members of the tribe the nations lost their interest in the lands and the individual occupants acquired none, but that the railroad acquired a complete title. By relation it meant an act done at one time operating upon the thing as if done at another time. The authorities hold that the doctrine is a fiction of law for the promotion of justice and of the lawful intention of the parties by giving effect to acts or instruments which, without it, would be invalid. We are thus brought to two crucial questions; that is, as to the intent of Congress in the passage of the act, and, next, as to the proper construction to be given to the act itself.

The civilized tribes had forfeited no rights secured to them by previous treaties because of their participation in the war which had just ended. It is true that the majority of the occupants of the land had, in the War between the States, taken up arms against the Government, but many of these occupants did not do so. It is historical that many occupants of the lands had during the war gone northward, but returned after the close of hostilities. But none of the occupants of the lands were hostile in 1866, and the evidence of this is that by new treaties rights acquired under former treaties were affirmed in July, 1866, upon certain conditions relating to the former slaves of the tribes, to whom property, as well as political rights, were given. The scope and effect of these new treaties was to put the world on notice that Government authority would continue to be exercised over permanent occupation of all lands not taken over absolutely at that time in virtue of the new treaties by the United States. Amnesty was extended to every participant in the struggle of the sections. None of these treaties meant forfeiture of previous Government obligation or Government interference with rights acquired under outstanding patents promised or granted by previous treaties.

The granting section carries words of absolute donation. Railroad Co. v. Smith, 9 Wall., 95; Schulenberg v. Harriman, 21 Ib., 60; Leavenworth R. R. Co. v. United States, 92 U. S., 733. The language implied present conveyance of the fee but subject to conditions liable never to happen. That is, the Indian title had to be extin-

guished and the lands had to become public lands, but nothing attached to any of the alternate sections until there was a survey of the lands as a part of the public domain of the United States, the road having been located. But as said in the case of Rice v. Railroad Co., 1 Black, 380, and repeated in the Leavenworth case, supra, the grant embraced such lands as could be sold and enjoyed and not those which the Indians, pursuant to treaty stipulations, were left free to occupy.

When learned counsel say it is immaterial whether the railroad claim be a grant in præsenti, or a grant in futuro, by what name the grant be called the concession would seem to follow that the granting act on its face involved contingencies too indefinite to have constituted a present or prospective transfer enough to be called a statutory grant of an interest. Whilst contending that the railroad acquired the reversionary interest of the United States they appeal to the rules of the common law, citing 2 Blackstone, c. 2, where the commentator says:

An estate in reversion is the residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him. Sir Edward Coke describes a reversion to be the returning of land to the grantor or his heirs after the grant is over.

When this act was passed the Government had already agreed never to assert the residue of any estate for itself so long as the occupants observed their treaties by remaining in possession.

But the learned commentator also says that "The fee simple of all lands must abide somewhere;" and that "A reversion is never created by deed or writing, but arises from construction of law." In Wallach v. Van Riswick, 92 U. S., 212, the Supreme Court recognized the common-law rule that a fee can not be in abeyance, though the reasons the court said were not to be of universal application because a common-law maxim must yield to statutory provisions inconsistent with the rule. Is there then anything in this alleged statutory contract inconsistent with the rule?

The act on its face only purported to grant the naked fee clouded by conditions and qualified by terms which left the grantor free to carry out the previous (and also contemporaneous) pledges of the Government to those already occupying the lands. The Government did not in the passage of the act divest itself of control. If it did, then the grantee had the better and superior right to assume control. The manner, time, and conditions of extinguishing the right of occupancy were exclusively matters for the consideration of the Government, and could not be interferred with nor put in contest by private parties. Buttz v. Northern Pacific Railroad, 119 U. S., 55.

If the conveyance of the reversionary interest operated as a present grant of the fee then there was presented the anomaly of the remainderman asserting ownership, with the power reserved by the grantor not only to remain in present control but in control for all time as well, for the want of a promise to ever determine the period of existence of the particular estate. When conditions were annexed

to this act by which the grantor could exercise the option of never determining the duration of the particular estate, the remainder attempted to be created or acquired is quite unlike those cases where the particular estate is given for the life of a person with remainder to another; or those cases where two persons hold the precedent estate as tenants for their joint lives remainder over to the survivor in fee. Freeholds in some of the States may commence in futuro, by deed or will, with or without the intervention of a precedent estate; but here the grant of the reversionary interest of the United States does not appear to have been the disposition of an estate in remainder, because an estate in remainder can not commence in futuro. The question then arises whether the sovereign power possessing the fee by retaining the right to render its conveyance of that fee nugatory and of no avail to the grantee because of agreements with others, did not create such a float as to keep the fee in that kind of abeyance as to amount to no grant at all. The intangible and unenforcible right appeared to be in the railroad (indefinitely suspended), but the right of control and ultimate disposition remained with the sovereign, for the benefit of those in possession whose title was as sacred as the fee itself.

This part of the discussion may be unnecessary and as beside the questions arising as to the happening of the conditions imposed.

But the nature of the alleged grant derives its preliminary importance from the character of the estate implied by the language of the granting act. In Doe v. Considine, 6 Wall., 476, the Supreme Court quoted with approval the rule as to when a remainder vested. The court said:

Where a remainder is limited to take effect in possession, if ever, immediately upon the determination of a particular estate, which estate is to determine by an event that must unavoidably happen by the efflux of time, the remainder vests as soon as the remainderman is in esse and ascertained, provided, etc.

In the case at bar the Indian estate could not be determined (according to the Supreme Court) except by a voluntary cession of the land, or by abandonment (thereby surrendering the benefit of treaty rights), or except by the arbitrary exercise of the power of Congress. As the sovereign annexed conditions to the grant before the railroad title could become perfect, and these conditions could only happen by the destruction of outstanding treaty obligations with the occupants, the interest acquired by the railroad under the rule stated can not be said to have become vested. There was an absence of any covenant that the particular estate would ever terminate. How and when was this event, the determination of this particular estate, unavoidably to happen if the obstacles interposed by the treaties and by the language of the grant left it in doubt whether the event could happen at all so as to vest any title in the railroad? The Supreme Court has said, 6 Wall., supra, that estates in abeyance were never favored, thereby standing upon the common-law rule.

Parenthetically, the railroad can hardly claim that the government plea of the Indian right is wanting in that exalted morality which the railroad claims for itself. While it is true that governments

may break treaties and that our own government has occasionally exercised the right to terminate protocols and like obligations with foreign governments as well as with our domestic tribes, the political power never does so except for the best of reasons and for causes plainly declared in unambiguous language. There are no instances where governments promise to break treaties; otherwise they would not be made.

The established rule of construction is that where there is uncertainty of the right of enjoyment the remainder is a contingent and not a vested remainder. While the Supreme Court in Kansas v. United States, 204 U. S., 331, dealt solely with the question of the original jurisdiction of the appellate tribunal in a case involving these very lands, there is contained in the opinion of that court the statement that if the allotments made to the individuals of these tribes should be taken from them (as a part of the relief sought by the bill then before the court) the United States would be subject to a demand from them for the value of the lands taken or for other lands involved. It is plain, then, that there was even from the railroad point of view uncertainty arising on the face of the act under which the grant is claimed as to which had the better right of enjoyment of the lands. With possession and the right of possession under treaty with the United States and properly claiming as individuals the heritable right of enjoyment until in the course of nature the individual beneficiaries became extinct or abandoned the use, a clear case is presented when we say there was enough uncertainty of the right to enjoy the benefit of the lands on the part of the railroad to say that no such estate vested in this plaintiff as the company can now assert.

There are cases where out of the terms of an express contract an implied obligation arises and becomes part of the contract itself. For example, in every lease there is, unless excluded by the operation of some express covenant or agreement, an implied obligation on the part of the lessee to so use the property as not unnecessarily to injure it. Obligations implied against citizens will be implied against the United States, but the circumstances must be the same, 94 U. S., 53. The principle also obtains that if a precedent act is to be performed at a certain time or place and a strict performance of it is prevented by the absence of the party who has a right to claim it, nonperformance of the condition can not be pleaded. Williams v. Bank, 2 Pet., 76. But to say that the language used in the act of July 25, 1866, raised an implied obligation on the part of the Government to extinguish titles and make the lands public lands for the benefit of this railroad is also to say that Congress committed the Government to a gross breach of public faith with the occupants of the lands at the time of the passage of the act. The Government did not do that. There was no pledge given by the United States by this grant as in Buttz v. Northern Pacific R. R., 119 U. S., 57, where it appeared that there was a stipulation for extinguishment and the Sioux had retired from the lands by agreement with the United States. The circumstances are too essentially different for any court to say that an implied contract could possibly grow out of language designed to prevent the contention for the thing now asserted.

There ought to be in this day and time no room for misunderstanding as to the nature of Indian titles. Beginning with the case of Johnson v. McIntosh, 8 Wheat., 543, and sustained by a long course of decision the principle is well established that the aboriginal title by virtue of occupancy became as sacred as the fee of the United States; that the Indian right of occupation has always been heritable but inalienable; and when abandoned by the occupants, possession attached itself to the fee. United States v. Cook, 19 Wall., 593; Jones v. Meehan, 175 U. S., 1; United States v. Winans, 198 Ib., 373.

This heritable and sacred right has from time to time been emphasized by the policy of the Government in making treaties with aboriginal occupants. The primitive control of the uses made of these lands passed by the treaties with the civilized tribes from the communal owners and became lodged in the government of the nations for the use of their members.

In Holden v. Joy, 17 Wall., 211, the court said that it was not important as between the parties in that case whether the title in dispute "was a fee simple or an Indian title of occupancy or some other title," but that the Indian tribes were capable of taking as owners in fee simple lands by purchase where the United States in form, for a valuable and declared consideration, sold such land to them. Considering that the civilized tribes yielded their possessions east of the Mississippi River for lands which they now occupy under treaties with the United States guaranteeing possession of the lands so occupied at the present time, the consideration was given because the treaties declared a consideration.

In Leavenworth R. R. v. United States, 92 U. S., 733, the court said that upon every principle of natural right lands dedicated to the Indian use should be carefully guarded by the Government and saved from a possible grant, and that "as the transfer of any part of an Indian reservation secured by treaty would involve a gross breach of public faith the presumption is conclusive that Congress never meant to grant it."

In Slidell v. Grandjean, 111 U. S., 437, the court declared that as nothing could be inferred against the State, that construction should be adopted which will support the Government rather than the individual where there is doubt as to the meaning of the terms of the statute granting public property to an individual. The court also thought the rule to be wise because such a rule serves to defeat any purpose concealed by the skillful use of the terms to accomplish something not apparent on the face of the act. Whether, in the present case, the agents of the railroad procured the passage of the act under which the claim is made or not, we still have before us the further opinion of the Supreme Court that acts granting public property are usually drawn by interested parties, who are presumed to claim all they are entitled to.

In Cherokee Nation v. Kansas Ry. Co., 135 U. S., 656, the court valued tribal patents from the United States as the equivalent of holding the lands in fee simple, saying that the lands of the Cherokee Nation, like lands held by private owners everywhere within the geographical limits of the United States, were held subject to the

authority of the general government in the exercise of the right of eminent domain to take them for such objects as were germane to the execution of the powers granted to it, provided only that the lands were not taken without just compensation being made to the owner.

The statutes of the Cherokees, for example, afforded evidence of a status, by virtue of treaties, somewhat different from the rights enjoyed by the aboriginal occupants. While the title to the lands passed from the communal owners and became lodged in the Indian governments for the use of the members of the tribe, these statutes were adopted under treaties for the better government of the individual Indians through the agencies of their own governments. In affirming this court in the case of Journeycake, 28 C. Cls. R., 302; 155 U. S., 206, the Supreme Court referred to the lands patented to the Cherokee Nation and said that the millions of acres of land appropriately styled common property of the Cherokee Nation and known as its public domain belonged to the Cherokees as a nation and that "the public domain of the Cherokee Nation is analogous to the public lands of the United States or the demesne lands of the crown held absolutely by the Cherokee Government, as all property is held, a trust for governmental purposes and to promote the general welfare."

In the case of The Delawares, 38 C. Cls. R., 249, which was affirmed by the Supreme Court, it was said by this court that the Cherokee Nation, in the policy of their national development, had granted a fee simple in one part of their country as to the rights of those members of the tribe desiring a change of their habitat and to another depending on the location of the grant a different tenure of right or estate, and that they were within the terms of one grant and omitted as to the other.

In Spaulding v. Chandler, 160 U. S., 406, the Supreme Court referred to certain orders relating to an Indian reserve and declared that the operation of those orders was clearly postponed until after the extinguishment of the reserve either by a voluntary cession to the government, a cession or abandonment of the use, or the arbitrary exercise by Congress of its power to appropriate the lands. I am not unmindful of the case of Fleming v. McCurtain, 215 U. S., 56, where it was decided that a treaty conveying a tract to the Choctaw Indians in fee simple to them and their descendants was a grant to the Choctaw Nation only; and that it did not create a trust for the individuals then comprising the nation and their respective descendants. In that case, however, it was made to appear that plaintiffs did not claim under any title to be derived from the statute providing for distribution according to the rolls of citizenship, nor did the bill attempt to bring plaintiffs within any grant later than the treaty and patent discussed by the court.

In the case at bar Congress manifested a clear purpose to abide by its treaties with the occupants of these lands at the time of the passage of the act of July 25, 1866. Taking the occurrences altogether, the purpose was made plain that there was no intent to take advantage of any of the tribes. The proof of this intent is found in that requirement that before the railroad company could secure

even the right of way through the lands from the Kansas line to the Texas border the consent of the occupants had first to be obtained unless the government reserved the right to grant by previous treaty. It would be a violent assumption to hold from the language of the act and from the circumstances surrounding its passage that Congress would impose the requirement on the railroad to obtain the Indian privilege of building and then, by another section, leave open the right of the company to take possession of every alternate section for a distance of 243 miles without the consent of the tribes who had become possessors of the soil with such a title as the government was recognizing to be as sacred as the fee.

In reassuming the obligations of previous treaties with the Cherokees and the other three tribes contemporaneous with the passage of the alleged grant to the railroad, Congress manifested a clear purpose to grant nothing except by the consent of the tribes.

Thus, by Article XI of the new treaty with the Cherokee Nation the United States stipulated that the road when built and operated should be subject to the Indian intercourse laws, and by the treaty itself the concession of the Cherokees only embraced a right of way not exceeding 200 feet wide except at stations, switches, water stations, or river crossings where more land might be indispensable, and then only 200 feet additional *was* provided to be taken if reserved by treaty, and by consent if not.

By the new treaty with the Choctaws and Chickasaws the United States also stipulated for a right of way through their lands to any company or companies authorized by Congress to undertake to construct roads through those nations, and when constructed such railroads were to be subject to the laws relating to intercourse with Indian tribes.

The United States by its new treaty with the Creek Nation stipulated for the right of way through their lands to any company duly authorized by Congress, but subjecting the road and its employees, as in the other cases, to the laws relating to intercourse with the Indian tribes.

By section 8 of the act of July 25, 1866, this Kansas & Neosho Valley Railway was authorized to extend and construct its road as stated in the petition with right of way through the Indian Territory wherever such right is now reserved or may hereafter be reserved to the United States by treaty with the Indian Tribes to the same extent as granted by the sixth section of the granting act through the public lands; and in all cases where the right of way should not be reserved to the Government the said company should before constructing its road secure the consent of the tribes in interest. Evidently the language of this section 8 was incorporated in the granting act to carry out the terms provided for by the new treaties with the occupants of the lands. Accordingly, these treaties must be taken in pari materia with the granting act because they were all under consideration by Congress at the same time and related to the same subject matter. No other view can be taken, because by section 10 of the granting act of 1866 it was declared:

That said Kansas City & Neosho Valley Railroad Company, its successors and assigns, shall have the right to negotiate with and

acquire from any Indian nation or tribe, authorized by the United State to dispose of lands for railroad purposes, and from any other nation or tribe of Indians through whose lands said railroad may pass, subject to the approval of the President of the United States, or from any company or parties incorporated or authorized for such purposes, by such nation or tribe, or which such parties may have acquired under the laws of the United States.

The United States by its new treaty with the Cherokees in Article XX provided that whenever the Cherokee National Council should request it the Secretary of the Interior should cause the country reserved for the Cherokees to be surveyed and allotted among them at the expense of the United States.

By its new treaty with the Chickasaws and Choctaws it was provided in section 2 of article 1 that the lands occupied by those treaties, as described in the treaty of 1855, were held in common, that it would promote the civilization of said nations and be to their best interests to have their lands allotted to individual members of the tribe in severalty. It was further provided by articles 11 to 36, inclusive, that their lands should be allotted in severalty and surveys made in the same manner that public lands of the United States were surveyed. Article 33 provided:

All lands selected as herein provided shall thereafter be held in severalty by the respective parties, and the unselected lands shall be the common property of the Choctaw and Chickasaw nations in their corporate capacities subject to the joint control of their legislative authorities.

In Minnesota v. Hitchcock, 185 U. S., 402, the Supreme Court alluded to allotments made in severalty and as containing something attempted more than a provision for the material wants of the Indians and declared it to be a duty for the government "to secure to the Indians all that by any fair construction of treaty or statute can be held to have been understood by them or intended by Congress."

It is impossible to resist the conclusion that there was nothing in the nature of an absolute grant to the plaintiff company creating contractual rights or to believe that the Government bound itself to extinguish the Indian title or to make their lands a part of the public domain of the United States.

How can it be said in view of the language of these treaties that there was any promise to any railroad to break other obligations for the benefit of a private company acquiring large bodies of land elsewhere and building roads to join with those being built in Texas northward?

But while the railroad admits that its title is derived from the ninth section of the act of July 25, 1866, counsel also contend that section 11 is fundamental and established the consideration for the grant or promise contained in section 9 which, when duly performed, made the grant or promise binding and irrevocably freed from any other conditions or restrictions than those contained in section 9. They deny that the proviso in section 1 applies to the language of the grant claimed under section 9 declaring that the reference in section 1 relates to the area of the grant alone. But the area is

definitely fixed by section 9 "not to exceed the ratio per mile granted in the first section of this act."

The proviso to section 1 is as follows:

Provided, That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby, reserved and excepted from the operation of this act, except so far as it may be found necessary to locate the route of said road through said reserved lands, in which case a right of way 200 feet in width is hereby granted, subject to the approval of the President of the United States.

As all the lands in the Indian Territory had already been reserved to the occupants, and that, too, by treaty, there was nothing upon which section 9 could operate until the Indian title would be extinguished and likewise until the land became a part of the public lands. On this point I think the contention of the government is sound. The reference in section 9 can not be made to apply to a single part or portion, but must be applied as far as possible to section 1 in its entirety, including each and every proviso forming a part of section 1. Taking the two sections and construing them together in the light of the treaty obligations assumed by the United States to the occupants, the purpose of Congress in incorporating the reference in section 9 was to throw around these occupants additional safeguards for their continued, permanent use of the lands, and were designed to exclude the construction of the terms of the alleged grant for which the plaintiff company is now contending.

The exception created by the proviso of section 9 is practically claimed to be without meaning, if the statement be true that by the doctrine of relation the title acquired by the grant became specific and related back to the date of the grant when the road was located and built and surveyed. The effect of this argument, if true, would be to wipe out the two conditions.

Again, it is contended that the extinguishment of the Indian title made the lands part of the public lands of the United States. If so, what would be the occasion for the use of the second condition as a separate proposition?

The title of an act can not be used to extend or to restrain any positive provisions contained in the body of an act. The title is only useful when the meaning of statutory provisions be doubtful, and even then is of little weight. Hadden v. The Collector, 5 Wall., 107; Goodlett v. Louisville Ky. Co., 122 U. S., 391. Ambiguity must be in the context and not in the title. United States v. Oregon Co., 164 U. S., 526. The title of the act before us providing for the extension of the road to Red River would apply as well to the grant of lands in Kansas to the railroad as to the grant claimed through the Indian Territory.

Considering the obligations of the treaties and their scope, that the real interest in the lands as a permanent home had been conferred upon the individual occupants; that the organized national tribal governments held the patents for the actual use of the memberships of the four nations, the purpose of the United States was at the

time of the passage of the act of July 25, 1866, as reasonably certain as when but recently the Supreme Court decided that by the act of April 26, 1906, 34 Stat., 137, Congress had not released control over the lands occupied by one of these tribes (the other three being on the same footing), notwithstanding the bestowal of citizenship upon the individuals. Tiger v. Western Investment Co., 221 U. S., 287. By the allotments there was no such extinguishment of the title of the beneficiaries in the occupancy of the lands as will permit plaintiff now to be heard to say that the first condition of the act of July 25, 1866, has been met. The subsequent legislation of Congress relating to these titles, and which counsel say can not affect the case, not only can but must be considered to assist in the interpretation of the prior legislation—a rule which the court must follow, as the Supreme Court has said in the last case cited.

The second condition set forth in the act of July 25, 1866, is of equally large import. Before this grant could take effect the lands asserted under the grant had to become public lands. But it is argued that "nothing can be clearer" than that Congress meant in the act of July 25, 1866, that when the tribal Indian title was extinguished, nothing else having supervened, the lands would be public lands of the United States, and that nothing else ever did supervene; and that in fact they were, immediately upon the extinguishment of the Indian title, used as public lands, subject to the uncontrolled exercise of the absolute power of the United States. But this uncontrolled and absolute power of disposition was for the use of the real beneficiaries of the title in furtherance of the preexisting treaty agreements. The lands were neither used as public lands of the United States nor ever expected to be opened to the public. All the people have an interest in the public lands of the United States. They are held in trust for the people of the whole country. United States v. Trinidad Coal Co., 137 U. S., 170.

The Government exercised the conceded power by virtue of the relation of the United States to the four tribes in their corporate capacity to convert the national tribal title to the use of the individuals of the tribes. The United States thereby abrogated the relation involved in the national or tribal holding in favor of the original beneficiaries. It has already been pointed out that the lands comprise the national domain of the tribes in their corporate capacity. It was corporate property of the Indian governments limited to uses of the individuals which made those governments a necessity for the welfare of the individual occupants.

If, for the sake of the argument, it be conceded that the Indian title was extinguished it does not follow that the lands did thereby become public lands because the extinguishment of the tribal title and the lands becoming public lands are not synonymous terms. The soil was not subject to absolute disposal of the United States without ignoring treaty rights which the occupants never supposed they could be called on to surrender. The condition that the lands should first become public lands is a separate and independent condition with but one meaning. To become public lands within the meaning of the act of July 25, 1866, the Government would have had to exclude the occupants from the alternate sections claimed under

the grant and open these lands to public entry. That result was clearly never contemplated because Congress knew and claimant also knew that there were outstanding patent rights which Congress reserved to deal with according to exigencies of public policy for the interests of the individuals of the nations who held the patents. These patents were in the nature of quitclaims of the United States subject to the rights of third parties holding prior claims to the lands but to no others.

It is claimed that at the time of the alleged grant there was in force an act passed in 1864, 13 Stat., 41; sec. 2115, R. S., which provided that:

Whenever it becomes necessary to survey any Indian or other reservations, or any lands, the same shall be surveyed under the direction and control of the General Land Office, and as nearly as may be in conformity to the rules and regulations under which other public lands are surveyed.

This statute does not specifically declare that the lands patented to the civilized tribes were public lands of the United States. Public lands are subject to pre-emption. These lands were not. The allotments certainly were not. The proceeds of the lands not needed for allotments were reserved for the occupants pursuant to the higher obligations stated.

The requirement of the proviso that the grant was not complete until these patented lands to the Indian occupants were made public lands of the United States was a legislative declaration and absolute notice that they were not public lands when the granting act was passed but had to become so, if at all, by subsequent legislation.

While learned counsel contend that it will not do to apply the ordinary technical rules and definitions found in other cases involving public lands to a case like this, they also concede that the use of the phrase "public lands" is not governed by an iron-clad and inflexible definition, but that it depends upon the facts of each particular case. In Union Pacific Co. v. Harris et al., 215 U. S., 386, the Supreme Court said:

What is meant by "public lands" is well settled. As stated in Newhall v. Sanger, 92 U. S., 763, "The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general law."

That case also recited that if in any given case the words are used in a different meaning it should be apparent either from the context or from the circumstances attending the legislation; and "while the power of Congress over lands which an individual is seeking to acquire under either the pre-emption or the homestead law remains until by the payment of the full purchase price required by the former law or the full occupation prescribed by the latter, yet under the general land laws of the United States one who, having made an entry, is in actual occupation under the preemption or homestead law can not be dispossessed of his priority at the instance of any individual," citing Hastings v. Whitney, 132 U. S., 363, 364. If, then, "one who has taken land under the preemption or homestead law acquires an equity of which he can not be deprived by any individual under the like laws," how much stronger is the case at bar

where there was not only an equity arising out of the considerations which took the occupants from their old homes east of the Mississippi River to their new domiciles in the West, but an agreement based upon treaty which operated to prevent any grant interfering with the rights thus acquired. In Bardon v. Northern Pacific R. R. Co., 145 U. S., 538, public land was defined to be such land as is open to sale or other disposition under general laws. It is not doubted that the United States had power to trample upon its treaty obligations and make the lands of the civilized tribes a part of the public domain of the Government, but there was every intendment to the contrary by the long series of treaties made with these occupants and finally a complete settlement of the question by the action of Congress in continuing the use of these lands according to the spirit of the treaties. In Barker v. Harvey, 181 U. S., 490, it was distinctly enunciated that lands burdened with a right of permanent occupancy were not a part of the public domain subject to full disposal by the United States. In Missouri, Kansas & Texas Ry. Co. v. Roberts, 152 U. S., 119, it was said that if the reservation there named was intended as a grant * * * it could only apply to such lands as were public lands, for no other lands in our land system are subdivided into sections, nor could it embrace lands which had been set apart and reserved by statute or treaty with them for the use of the Indians, as was the case with the lands in this controversy. It is insisted finally, that the conditions precedent can not be insisted upon to defeat the railroad claim (if it be held that the Indian title has not been extinguished or that the lands have not become public lands), because of the rule that no party to a contract can insist on the fulfillment of a condition, the happening or execution of which it renders impossible.

There are cases of private right where it appears that if a party to a contract who is entitled to the benefit of a condition upon the performance of which responsibility is to arise dispense with, or by act of his own, prevent the performance, the opposite party is excused from proving a strict compliance with the condition. These cases, however, rest upon contracts containing covenants by the grantor to bring about the event on the happening of which his obligation depends or covenants necessarily implied from the terms of the agreements of the parties.

It does not follow that this statutory grant, if it be considered as a grant at all, can be construed as comprising a covenant "that after a reasonable time the Indian title" should be extinguished, or that the lands should become public lands so far as necessary to effectuate the grant. The proposition of learned counsel that the granting act contains implied covenants of any such character is a mistake. The government did not disable itself by the grant from keeping the occupants and their descendants on the land at will. The treaties provided that the United States could do that very thing. Congress did not intend, and by the terms of the granting act did not surrender the constitutional power of the government to maintain the occupancy of those in possession. With notice of contemporaneous action providing for such dealing with the land as made it a matter of doubt whether the statutory grant could ever be effectuated, it is

but fair to say that the railroad was neither misled nor deceived; that the railroad interest knew that the claim of the road was too remote and uncertain for purposes of credit at any time, and that the road would be built, and was expected to be built, by the aid of its grants of land elsewhere. It is reasonable to assume, considering the situation and the conditions imposed, that the agents of the company took chances as to the ultimate action of the government.

After everything is said relating to this grant, with its attendant conditions, we come back to the jurisdictional phase of the matter, because the legislation of Congress providing for perpetual Indian uses of the lands renews the question of the power of the court to proceed. Especially is there presented the right of the court to proceed because of the act approved April 26, 1906, 34 Stat., 137.

Section 27 of that act provides that the lands belonging to the four tribes shall not become public lands, but shall be held in trust by the United States for the use and benefit of the members. All acts inconsistent with this section being expressly repealed, can it be said that the claim is justiciable?

There is no middle ground to take as between the contention of learned counsel for the railroad that the allotment proceedings beginning with the creation of the Dawes Commission and closing with the act last mentioned (including several intermediate acts) are acts of outright repudiation or are statutes which Congress had the power to enact and the President to approve.

Congress may not break the contracts of the government where rights have become vested. On the other hand, the discharge of political duties entrusted by the Constitution to the political departments of the government cannot be the proper subject of complaint by an appeal to the courts.

Underlying all the subsequent legislation leading up to the act last mentioned (which in itself is a legislative construction of direct application in the dispute relating to the nature of the grant in this cause) are treaties between this government as the sovereign and the four nations of red men. While the construction of treaties is the province of the judiciary, and certain rights under treaties cannot be affected by legislation, cases arising under treaties of a purely political character may be the subject of legislative action. In Reichart v. Felps, 6 Wall., 160, it was held that patents of the United States for land which it had previously granted, reserved from sale, or appropriated are void. At the time of this grant the plenary power of the legislative body was ample to determine that patents other than those being confirmed for Indian uses might issue and that such patents should not be void. The law-making authority could arbitrarily at that time have exercised the legislative prerogative of granting the full title to this railroad with no conditions of any kind annexed. Congress, however, did not choose to pursue this course, but gave the people in possession to understand by contemporaneous treaty agreement that their possession would never be disturbed except by consent. In Jones v. Meehan, 175 U. S., 1, where a reservation neither identified nor surveyed, but provided to be located in the future, it was held by the court to have been converted into reserve sections of individual property by treaty. In the

case before the court the same conditions were contemplated from the outset.

The history of the government's dealings with the property in controversy shows that these lands were reserved from the beginning from the public lands which were to be sold, and that from the time the occupants were put upon these reservations it was never intended that any part of that country should be sold as public lands. The lands were patented to organized civil tribal governments created by direction of Congress pursuant to a great public policy for the benefit of the coming generations of individuals of a class. The patents rested on treaties made with tribal governments as agencies for the individuals in interest. In every treaty and by repeated declaration of intention the government committed itself to the policy of maintaining and protecting the full membership in their possession. Property of these tribes was withdrawn from the operation of state laws. It was not the subject of taxation so long as tribal organization continued to be recognized by the political department. The Kansas Indians, 5 Wall., 737. When the treaty-making system with domestic Indians was abandoned in 1871 Congress provided (sec. 2079, Revised Statutes) that "no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired."

As with treaties made with foreign nations, Chinese Exclusion case, 130 U. S., 600, the legislative power has the right to pass laws in conflict with treaties made with the Indians. Lone Wolf v. Hitchcock, 187 U. S., 553. But as said in Stephens v. Cherokee Nation, 174 U. S., 483, and in Choctaw Nation v. United States, 119 U. S., 27, the action of Congress complained of there was but an exercise of the full administrative power possessed by Congress over Indian tribal property, "the property of those who * * * were in substantial effect the wards of the government. As Congress possessed full power in the matter the judiciary cannot question or inquire into the motives which prompted the enactment of the legislation. If injury was occasioned, which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought by an appeal to that body for redress and not *for* the courts."

And in the case of Cherokee Nation v. Hitchcock, supra, the court quoted from a Senate document to the effect that "the title to these lands is held by the tribe in trust for the people."

As the plenary authority over the occupants of these lands has always been deemed a political power not subject to be controlled by the judicial department of the government, the claim of this railroad, as I see it, is not within the power of the court to aid. Its right never vested sufficiently for the courts to say that Congress did not reserve the power of control enough to make the grant effective without the consent of the occupants or to carry out the promises of the treaties without the consent of the railroad because there were no covenants expressed or implied to either extinguish the Indian title or to open the lands to the public except for Indian uses.

The action of Congress carrying out the treaties of the government with the occupants of these lands was in no sense the repudiation of an implied promise to the railroad, because no promise could be implied against the right of the government to deal with the manner, time, and conditions of extinguishing the title outstanding at the time of the grant. These were matters exclusively for the consideration of the government and can not be interfered with nor put in contest by private parties. Buttz v. Northern Pacific Railroad, 119 U. S., 55.

This court is without authority to entertain jurisdiction on the demand of plaintiff for a money judgment for the want of covenants carrying an express promise, or, by necessary implication, an implied promise to pay. There is no more jurisdiction in this court to entertain such a proceeding than there is in the courts where the lands are situate to maintain ejectment proceedings against the occupants for the possession of the lands.

V. *Claimant's Desire Not to Amend Petition, Filed February* 26, 1912, *and Order of Court Thereon, Filed February* 26, 1912.

Court of Claims of the United States.

No. 30016.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY
vs.
THE UNITED STATES.

Now comes the Missouri, Kansas & Texas Railway Company, petitioner in the above entitled cause, by its attorney of record, and hereby respectfully informs the Court that the petitioner does not desire to amend its petition, notwithstanding the order of this Court, heretofore entered on December fourth, nineteen hundred and eleven, permitting it so to do.

JAMES HAGERMAN,
Attorney for Petitioner.

Order on Above.

Let judgment be entered dismissing petition on ruling on demurrer.

By the Court:

STANTON J. PEELLE,
Chief Justice.

February 26, 1912.

VI. *Judgment of the Court.*

No. 30016.

MISSOURI, KANSAS & TEXAS RAILWAY CO.
vs.
THE UNITED STATES.

In this cause, February 26, 1912, the Court on due consideration of the premises having sustained the defendant's demurrer and claimant having declined to amend its petition, it is now ordered, adjudged and decreed that the petition of the said Missouri, Kansas and Texas Railway Company be and the same is hereby dismissed.

It is further adjudged that the United States recover of and from the claimant herein their costs and charges herein fixed at $—

BY THE COURT.

VII. *Application for and Allowance of Appeal.*

Court of Claims of the United States.

No. 30016.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY
vs.
THE UNITED STATES.

Now comes petitioners in the above entitled cause and prays the Court to grant an appeal to the Supreme Court of the United States from the decision and judgment of this Court sustaining the demurrer of the defendant and dismissing the petition, and upon the accompanying assignments of error.

JAMES HAGERMAN,
Attorney for Petitioner.

Service of copy acknowledged this 26th day of February, 1912.

JOHN Q. THOMPSON,
Assistant Attorney General.
F. DE C. F.

Filed February 26, 1912.

Ordered:

Application for appeal allowed. The accompanying assignments of error therein referred to, filed on same date, denied.

February 27, 1912.

By the Court:

STANTON J. PEELLE,
Chief Justice.

In the Court of Claims.

No. 30016.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY
vs.
THE UNITED STATES.

I, John Randolph, Assistant Clerk Court of Claims certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the demurrer filed by the defendants; of the opinion of the Court sustaining the demurrer with leave to claimant to amend petition, and of the concurring opinion; of the answer of claimant declining to amend petition and order of Court to enter judgment; of the final judgment; of the application for, and allowance of, appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this 21st day of March, 1912.

[Seal Court of Claims.]

JOHN RANDOLPH,
Assistant Clerk Court of Claims.

Endorsed on cover: File No. 23,109. Court of Claims. Term No. 1033. Missouri, Kansas & Texas Railway Company, appellant, vs. The United States. Filed March 21st, 1912. File No. 23,109.

Office Supreme Court, U. S.
FILED
MAR 7 1914
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1914

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, *Appellant,*

vs.

THE UNITED STATES OF AMERICA.

No. 25

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

JOSEPH M. BRYSON,
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H. S. PRIEST,
A. B. BROWNE,
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W. W. BROWN,
Of Counsel.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1913.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, *Appellant,*
vs.
THE UNITED STATES OF AMERICA. } No. 219.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

Appellant filed in the Court of Claims Petition to recover

> "for breach of the covenants of its grants of lands in the Indian Territory under acts of Congress of the United States herein set forth, and the ascertainment of and judgment for its damages resulting therefrom. * * *"

Such Petition sets forth with great detail its justiciable case (R., pp. 1-79), accompanied by exhibits attached to and made part thereof (R., pp. 80-705). No

fact of record and no transaction nearly or remotely relevant was omitted, the laudable purpose being to thus affirmatively present the claimant's entire case. The Petition was met by defendant's demurrer (R., p. 705):

> "1. That the matters complained of are not within the jurisdiction of this Honorable Court, and are not cognizable therein.
>
> "2. That the petition does not allege facts sufficient to constitute a cause of action falling within the jurisdiction of this Honorable Court."

The case was heard upon these pleadings, the court below rendering decision upon the *merits* sustaining the demurrer with leave to claimant to amend (R., pp. 705-717), Howry, J., filing separate concurring opinion (R., pp. 717-742). The claimant company having set forth its entire case in its Petition, had no amendment to offer thereto, and on so advising the Court (R., p. 742) judgment was entered dismissing the Petition (R., p. 743). Appeal was immediately prayed and allowed to this Honorable Court, with assignment of errors which the court below refused to permit to be there filed (R., p. 743). Certified copy of such assignment of errors was filed with the clerk of this court when the cause was here docketed. They appear *infra*.

STATEMENT.

The case stands upon appellant's Petition, the demurrer thereto admitting all relevant facts, which are well pleaded therein. The Petition is necessarily lengthy, for it presents in detail Federal and State acts, treaties and Federal executive action extending over more than half a century. Its condensed state-

ment here is submitted with all deference and the respectful assurance to the Court that detailed reading of the pleading will be most helpful to the full grasp of the appellant's case and will as clearly demonstrate that it has a cause of action arising (1) under the Constitution and laws of the United States, and (2) for breach of contract, thus fully meeting the jurisdictional requirements imposed by the law upon claimants seeking relief in the Court of Claims.

I.

Appellant was incorporated September 20, 1865, under the laws of the State of Kansas, by the name, "Union Pacific Railway, Southern Branch," and

> "for the purpose of constructing a line of railway commencing at or near Fort Riley, or the junction of the Republican and Smoky Hill Forks of the Kansas River and on the line of the Union Pacific Railway, Eastern Division, running thence south via Clarke's Creek and the Neosho River to a point at or near where the southern boundary of the State of Kansas crosses said Neosho River, with the power to extend the same in a southerly direction across the Indian Territory."

Thereafter, and on April 4, 1870, its name was lawfully changed to *Missouri, Kansas & Texas Railway Company* (R., pp. 2-3).

II.

March 3, 1863 (12 Stats. 772), Congress passed an act granting to the State of Kansas public lands in alternate sections to aid the construction of a railroad east and west across the State from the City of Atchison via Topeka, with a branch extending from the

point where such road crossed the Neosho Valley south and easterly to a point where a projected railroad line, also aided by the same act, called the Leavenworth, Lawrence & Fort Gibson Railroad, extending from the City of Leavenworth via Lawrence to the south boundary of Kansas, entered the Neosho Valley. The route of such branch line down the Neosho Valley as named in the Act of 1863 was substantially the route covered by petitioner's charter (Pet. R., pp. 4-5).

III.

February 9, 1864, the Legislature of Kansas duly accepted this grant, and conferred its benefits on the Atchison, Topeka & Santa Fe Railway Company in so far as the grant of lands covered the route extending east and west across the State and the branch line down the Neosho Valley to the south boundary of the State. By Act of July 1st, 1864, Congress extended the grant for the branch line northward to Fort Riley, on the Union Pacific Railroad (13 Stats., p. 339), thus covering the line which the appellant was under its charter organized to build (Pet. R., pp. 5-6).

IV.

March 19, 1866, the Atchison, Topeka & Santa Fe Railway Company assigned to the appellant company all its rights in the land grants made by the Acts of March 3, 1863, and of July 1, 1864, *supra*, to aid the construction of the road extending from Fort Riley on the Union Pacific line down the Neosho Valley to the south boundary of the State. This assignment was approved by the State of Kansas and has since been recognized by the United States in adjusting the land grants thereunder, and has also been held binding and legal in the courts of the United States (Pet. R., p. 7).

V.

In addition to these two projected railroad lines to the southern boundary of Kansas, to-wit, the Missouri, Kansas & Texas (this appellant), and the Leavenworth, Lawrence & Fort Gibson, another company had been chartered under the laws of Kansas, named the Kansas & Neosho Valley Railroad Company, and authorized to construct from the eastern terminus of the Union Pacific Railroad, Eastern Division, at or near the Kansas-Missouri state line, southwardly through the eastern tier counties of Kansas, with a view to its extension so as to effect a junction at Red River with the railroad then being constructed from Galveston, Texas, northward to Red River, at or near Preston (now Denison), in Texas. Neither of these three companies had authority to construct a line across the Indian Territory.

The experience of the Civil War had developed the national weakness in lack of railroad communication for speedy transmission of troops and munitions of war, as well as the mails, throughout the West and Northwest to the Pacific, and Southwest to the Gulf of Mexico. During the war Congress had sought by the Acts of 1862 and 1864, to the Union Pacific and Central Pacific Railroad Companies, to aid the speedy construction of a transcontinental road by grants of land and subsidy bonds, as well as by the Act of 1864, aiding by a grant of lands, the construction of the Northern Pacific Railroad to the north Pacific coast. There was obvious and pressing need for like extension of a railroad through the Southwest to the Gulf of Mexico. The grants of land made by these Acts of 1863 and 1864, *supra*, in Kansas, for the construction of roads to the southern boundary of Kansas, gave neither ingress to nor sub-

stantial aid for the construction of railroads across the intervening barrier of the Indian Territory, to reach the Southwest and the Gulf ports. The Civilized Tribes occupying the Indian Territory had largely affiliated with the Confederacy, and their treaties with the Federal Government, through such hostility, became thereby impaired, if not annulled. Immediately following the close of the Civil War new treaties with these nations were negotiated, and in 1866 completed, each containing the consent of the Indians for the construction of one road east and west and one road north and south through the Indian Territory. *Pari passu* therewith, Congress enacted legislation which would insure the construction of such north and south road, and on July 25 and July 26, 1866, two acts were approved, directed solely to that end. (Copies of these acts, in full, are printed in the appendix, pages 433 and 441, respectively.) The Act of July 25, 1866 (R., pp. 8-13), (in Section 1), granted to the State of Kansas, for the purpose of aiding the construction of the Kansas & Neosho Valley Railroad, of its stated line from the Kansas-Missouri boundary southerly through the eastern tier of counties in Kansas, with a view to its extension to the Red River (on the southern boundary of the Indian Territory, and to there connect with the road then under construction from Galveston to the Red River),

> "every alternate section of land or parts thereof, designated by odd numbers, to the extent of ten sections per mile on each side of said road, to be selected within twenty miles from (of) the line of said road;"

with provision for selection of lands within a larger limit by way of indemnity to compensate for lands within the primary limits found on definite location

of the line to have been theretofore sold or taken under the pre-emption or homestead laws, or reserved for other purposes. By Section 8 thereof, the company named was authorized

> "to extend and construct its railroad from the southern boundary of Kansas south through the Indian Territory to Red River, at or near Preston, in the State of Texas, so as to connect with the railway now being constructed from Galveston to a point at or near Preston in said State,"

and with grant of right-of-way for such purpose through the Indian Territory.

Section 9 of that act further provided:

> "Sec. 9. *And be it further enacted*, That the same grants *of lands through* the Indian Territory *are hereby made* as provided in the first section of this act, whenever the Indian title shall be extinguished by treaty or otherwise, not to exceed the ratio per mile granted in the first section of this act: *Provided*, That the *said lands* become a part of the public lands of the United States." (Italics ours.)

By Section 11 thereof it was further provided:

> "That should the Leavenworth, Lawrence & Fort Gibson Railroad Company, or the Union Pacific Railroad Company, Southern Branch (this appellant), construct and complete its road to that point on the southern boundary of the State of Kansas where the line of the said Kansas & Neosho Valley Railroad shall cross the same, before the said Kansas & Neosho Valley Railroad Company shall have constructed and completed its said road to said point, then, and in that event, the company so first reaching in completion the said point on the southern boundary of the State

of Kansas shall be authorized, upon obtaining the written approval of the President of the United States, to construct and operate its line of railroad from said point to a point at or near Preston in the State of Texas, *with grants of land according to the provisions of this act*, but upon the further special condition, nevertheless, that said railroad company shall have commenced in good faith the construction thereof before the said Kansas & Neosho Valley Railroad Company shall have completed its said railroad to said point. *And provided further*, That said other railroad so having commenced said work in good faith shall continue to prosecute the same with sufficient energy to insure the completion of the same within a reasonable time, subject to the approval of the President of the United States."

The Act of July 26, 1866 (R., pp. 14-18), made a similar grant of lands to the State of Kansas,

"for the purpose of aiding the Union Pacific Railroad Company, Southern Branch (this appellant), the same being a corporation organized under the laws of the State of Kansas, to construct and operate a railroad from Fort Riley, Kansas, or near said military reservation, thence down the valley of the Neosho River to the southern line of the State of Kansas, with a view to an extension of the same *through a portion of the Indian Territory to Fort Smith, Arkansas.* * * * "

Section 9 of this act provided:

"That the same grant (s) of lands through said Indian Territory *are hereby made* as provided in the first section of this act, whenever the Indian title shall be extinguished by treaty or otherwise, not to exceed the ratio per mile granted in the

first section of this act: *Provided*, That said lands become a part of the public lands of the United States." (Italics ours.)

The Acts of July 25 and July 26, 1866, are set forth in full in the Petition (R., pp. 8-13, 14-18).

Under Section 11 of the Act of July 25, 1866, *supra*, a race of diligence followed, inasmuch as the company first reaching the southern boundary of Kansas at the point indicated with its constructed line became *the* company authorized to build the single line of railroad north and south through the Indian Territory to the Red River, on the Texas boundary, "*with grants of land according to the provisions of this Act.*" This appellant company, by diligence in construction, became first in time. Upon completion of its railroad to that point, a controversy arose between it and the other railroads mentioned in Section 11 of the Act of July 25, 1866, *supra*, as well as with the Indian nations. All parties to that controversy were fully heard by the Secretary of the Interior, who on May 21, 1870, made report to the President that under the legislation above recited these three companies were authorized to build their lines to the common point on the northern boundary of the Cherokee lands in the Indian Territory, and that the road which should first succeed in reaching that point was authorized to build the single trunk road through the Indian Territory to a point at or near Preston (now Denison), in the State of Texas; that only one such line of railroad was authorized to be built from the north to the south; that appellant's railroad had been first constructed in substantial accord with the scheme provided by the acts of Congress and the Indian treaties, and recommended that a commission be appointed to determine which of

said companies had first fully complied with these requirements. That recommendation was approved by the President on May 23, 1870, and the commission appointed thereunder, later reported that this appellant had first completed the construction of its line to the northern boundary of the Indian Territory on the 6th day of June, 1870. In addition thereto the Governor of the State of Kansas had certified (as by the Acts of July 25 and 26, 1866, required) that this appellant company had constructed its road in all respects as required by law. Thereupon a further hearing was had before the Secretary of the Interior, who found that appellant's road had been first constructed, and recommended to the President that authority be given appellant company under the terms of the eleventh section of the Act of July 25, 1866, *supra*, to construct and operate its line of railway onward through the Indian Territory from the designated point on the northern boundary thereof. And as under said acts the President's authority to construct was necessary, further recommended that the Chief Executive should prescribe the mode of construction and completion in specific detail; that a commission be appointed to see that the road was so constructed, and that appellant company be required to give a bond to the United States, conditioned that the company (this appellant) should in every particular respect the rights of the Indian tribes and the individuals thereof, as guaranteed by the treaties and the intercourse and other statutes of the United States. The President approved this recommendation, and the company was notified on October 22, 1870, of its right to construct its railroad through the Indian Territory contingent upon the execution of the bond prescribed. Such bond was

duly executed and filed and construction of the road promptly proceeded. The road of the appellant company when completed from the northern boundary line of the Indian Territory to the Arkansas River therein, was examined by the commissioners, and their favorable report and acceptance approved by the President on May 17, 1872. On December 10, 1872, the President appointed like commissioners to examine that portion of the railroad extending from the Arkansas River to the Red River (the south boundary of the Indian Territory), whose favorable report was accepted and approved by the President on March 11, 1873. The full official records of all these proceedings appear as exhibits to the appellant's Petition, and are found in the Record from pages 107 to 168.

From these recitals, it is plain that the appellant company constructed its road across the Indian Territory with remarkable promptness. Its entire land grant aided line from Junction City, Kansas, through the Indian Territory, and its railroad from the southern boundary of the Territory across the State of Texas, built under authority of that State (Pet. R., pp. 3-4), has since been continuously operated. The United States has since continuously enjoyed the primary use thereof in the transportation of troops and munitions of war, and in the expeditious transmission of the mails. The contract between the Government and the appellant company was thus long since fully executed on the part of the latter, and its land-grant obligations have since been matters of continuous and daily enjoyment by the Government, all of which facts fully justifies the averment of the petition (R., p. 32) that "under and by virtue of the propositions and covenants contained in said Act of the Congress of the

United States of July 25, 1866, to your petitioner, and by reason of the acceptance thereof by your petitioner and the performance on the part of your petitioner of the conditions contained in said act, as herein and at length set forth, the United States covenanted to and with your petitioner that it would, and by said Act of July 25, 1866, did, grant and convey to your petitioner the fee-simple title to every alternate section of land or parts thereof, designated by odd numbers, to the extent of ten sections per mile on each side of the railway of your petitioner through the Indian Territory, within twenty miles of and from the same, subject only to the Indian title of occupancy until the same should be extinguished—that is, to such communal, possessory, and usufructuary rights therein and thereto as then existed in the Cherokee, Creek, Choctaw and Chickasaw nations or tribes of Indians. Your petitioner further avers that, as herein shown, said Indian title has been extinguished."

VI.

The Petition further avers (R., pp. 33, 34) that since the construction of its line of railway through the Indian Territory, all of the lands therein, including those within twenty miles of the appellant's line of railway, have been surveyed by the United States at public expense, and according to the method of public land surveys, and submits therewith a detailed description by township, range and section of every alternate section of land or part thereof, designated by odd numbers to the extent of ten sections per mile on each side of the appellant's line of railway, and within twenty miles thereof, showing an aggregate acreage of 3,064,390 acres as inuring to it under the grant.

VII.

The Petition further avers (R., p. 34):

"Your petitioner further states that, notwithstanding its rights to the lands granted, the United States, through Congress and the action of its executive departments, including the Secretary of the Interior and the Commission to the Five Civilized Tribes and various townsite commissions, has extinguished the Indian title to said lands by treaties with the Indian nations and otherwise, by patenting or deeding the lands to individual allottees, to purchasers of townsite lots, and to others, and in other ways, as herein shown."

There is then set forth in extended detail the specific acts of Congress, and executive action taken pursuant to the authority thereof, whereby the general tribal or communal title of each of these tribes of Indians was in fact extinguished and the entire title, including the paramount interest of the United States *which had been granted appellant*, was passed to and vested in the individual Indians, adopted whites, and freedmen of such tribes in specific tracts, through a process of special allotment carried on and finally consummated under the so-called Dawes Commission, and since the abolishment of that commission through the Secretary of the Interior direct, and by the sale and disposition of town lots and the leasing of coal, gas and asphalt lands. The deeds of allotment were joined in by the principal chief of each nation as representing his particular tribe, and by the Secretary of the Interior under express statute providing therefor, *relinquishing the interest of the United States (which had been granted appellant)*, each deed declaring that its acceptance by the allottee declared his waiver of communal interest in all other of the lands allotted to

others. Further detailed recital on this head would unnecessarily lengthen this statement. The legal effect of all this legislation and executive action thereunder was to extinguish not only the tribal or *Indian title, but the paramount or fee title of this appellant under the grant aforesaid without its consent* and there was a distinctive parceling of the lands in *fee* to individual Indians and a specific surrender by each allottee of all tribal or communal interest in all other lands so allotted to others. Against all of this legislation and executive action thereunder, the Petition sets forth at length (R., pp. 43-44, 54-62) the earnest protests repeatedly filed by the company with the Secretary of the Interior, with the Dawes Commission, with the United States Indian Agent, with the various townsite commissions and with the chiefs of the respective nations or tribes, setting forth in explicit terms the rights of the appellant company to the lands embraced in its stated land grant, and protesting against disposal of such lands by the proposed allotment deeds or otherwise. Copies of such protests appear as exhibits to the petition and are found in the record from pages 391 to 527, inclusive. The forms of the allotment deeds or patents also appear at pages 631 to 643, inclusive, and the forms of the townsite deeds appear at pages 641 to 654, inclusive. It will be noted that each deed provides for its approval by the Secretary of the Interior pursuant to the statute which makes such approval serve *as a relinquishment to the grantee of all the right, title and interest of the United States in and to the lands described therein*, although the reversionary interest, being the fee-simple title to said lands, had been granted to appellant.

Following this extended recital, the Petition avers (R., pp. 71-78):

"Your petitioner shows that on the faith of the contract between your petitioner and the United States so as aforesaid entered into, and the grant of lands made to it by the United States in and by said acts of July 25 and 26, 1866, your petitioner undertook to and did construct its railway through the Indian Territory, notwithstanding the same at the time and for many years thereafter was free from settlement, except by bands or tribes of Indians, and afforded practically no traffic, freight or passenger, to your petitioner; and your petitioner states that at the time its line of railway was constructed through the Indian Territory—that is to say, in the years 1870, 1871 and 1872—the said Territory was practically a wilderness, and your petitioner attaches hereto, as Exhibit C, a map of said Territory, prepared in the year 1866 by the Government of the United States, to which reference is hereby made, and your petitioner asks that same be considered a part of this petition with like effect as though same was herein incorporated (R., p. 83).

"Your petitioner further states that upon the strength of the contract between the United States and your petitioner and the grant of lands, as aforesaid, to your petitioner in the Indian Territory, it secured additional subscribers to its capital stock and bonds, and the money thus secured was used in the construction of its said railroad through the Indian Territory and elsewhere; and your petitioner states that a pamphlet, with a map, Exhibit B, *supra* (R., p. 82), attached showing your petitioner's line of railway and land grants, in the nature of a prospectus, was prepared by your petitioner in 1871 and generally dis-

tributed throughout the country, setting forth the grants so made by the United States to your petitioner for the construction of its line of railway in Kansas and through the Indian Territory and the grants of lands thereunder.

"Your petitioner further shows that as a result of the construction of your petitioner's line of railway through the Indian Territory the even-numbered sections of land adjacent to the odd-numbered sections of land so granted to your petitioner, as aforesaid, became, were, and are of more value than both the even and odd numbered sections would have been but for the construction, maintenance, and operation of your petitioner's railway.

"Your petitioner further states that for many years after the construction of your petitioner's line of railway through the Indian Territory said Territory remained uncultivated and unproductive of local traffic, by reason of its sparse settlement, and that your petitioner could not and would not have constructed said line but and except for the land grant so made as aforesaid by the United States to your petitioner and the grant of land pursuant thereto, because the money to build the same could never have been secured at that early day except upon the faith of such grant.

"Your petitioner further shows that in every respect it has complied with its obligations as to the building, maintenance, and operation of its said railway through the Indian Territory, but that the United States, contrary to its obligations and in violation of its said contract with your petitioner, and contrary to its covenants in said grant of said odd-numbered sections of land in the Indian Territory to your petitioner, and contrary to equity and good conscience, breached its

said contract and covenants with your petitioner and its obligations and grants under said contract and said Act of Congress of July 25, 1866, by deeding and causing to be deeded said lands to allottees, reservees, and purchasers as herein recited. Your petitioner states that the value of the odd-numbered sections and parts thereof so granted to your petitioner as aforesaid and listed in the schedule, Exhibit No. 43 (R., p. 678), was at the time of the extinguishment of the Indian title by the execution of the deeds by the United States, as aforesaid, to allottees, reservees, and vendees, twenty dollars per acre for the entire odd-numbered sections or parts thereof lying within twenty miles on each side of your petitioner's line of railway through the Indian Territory, or an aggregate value of $61,287,800.00.

"Your petitioner further shows that on the 30th of April, 1906, the State of Kansas, at the request and upon the petition of your petitioner, instituted an original suit in the Supreme Court of the United States against the United States, the Secretary of the Interior, the Commissioner of the General Land Office, and certain Indian allottees and vendees of such allottees, to recover, as trustee for your petitioner, the lands granted to your petitioner in the Indian Territory by its land grants, and subsequently, on February 23, 1907, on motion of the United States and other defendants, the said suit was dismissed for want of original jurisdiction, and without reference to the merits of the controversy raised by the bill, the Supreme Court holding that the land grant in the Indian Territory was in effect a grant direct to your petitioner, in which the State of Kansas had no substantial interest, but was, if anything, only a trustee of the naked title, and on the further ground that the United States had

not given its consent to be sued in the Supreme Court as a court of original jurisdiction, and therefore could not be sued in that case in that court. The court, however, held in that case, as shown by its opinion, a copy of which is filed herewith as Exhibit No. 44 (R., pp. 699-704½), that the United States was the real party defendant, and that if the allotments should be taken from the individual Indians and those claiming under them, which was part of the relief sought by the bill, the United States would be subject to a demand from them for the value thereof or for other lands. Your petitioner avers that it is advised and believes, and asserts the fact to be, that the United States, being the party ultimately in interest, is directly responsible to your petitioner in this court for the breach of the covenants of its grant whereby the granted lands have been patented and are being patented to other parties than your petitioner, and that your petitioner is entitled to recover directly in this suit a judgment for the value of the granted lands which have been patented to other parties and which, but for the breach of the covenants of the United States, should have been patented to your petitioner.

"Your petitioner, in conclusion, charges, by way of summary of the allegations herein contained, that the Congress of the United States granted to your petitioner all of the odd-numbered sections of land within the twenty-mile limits along the line of its railroad as located and constructed through the Indian Territory from the southern boundary of the State of Kansas to the northern boundary line of the State of Texas; that by the terms of section 9 of the Act of Congress of July 25, 1866, it was provided—

"'*And be it further enacted*, That the same

> grants of lands through the Indian Territory are hereby made as provided in the first section of this act, whenever the Indian title shall be extinguished by treaty or otherwise, not to exceed the ratio per mile granted in the first section of this act: *Provided*, That said lands become a part of the public lands of the United States.'

and by the first section of said act it was provided—

> "'There is hereby granted to the State of Kansas, for the use and benefit of said railroad company, every alternate section of land or parts thereof, designated by odd numbers, to the extent of ten sections per mile on each side of said road, to be selected within twenty miles from the line of said road;'

and in case there was a deficiency in said grant of odd-numbered sections, owing to the reservations by the United States for any purpose whatever, then there was granted even-numbered sections within said twenty-mile limits in lieu of such odd-numbered sections, in such an amount as to make a full grant of twenty sections per mile along said railroad as definitely located and constructed. Your petitioner further shows that, having obtained the authority of the Creek, Cherokee, Choctaw and Chickasaw nations and of the President of the United States and the Secretary of the Interior, it built its railroad across the Indian Territory within the time required by said act and upon the route authorized by the United States and the Indian nations; that it completed the construction of its railroad in 1872 and has ever since maintained and operated the same; that by the building of its road it earned the grants, and has ever since asserted, in va-

rious ways and at all proper times, its claim to said grants.

"Your petitioner shows that the United States held the paramount title to said lands as public lands of the United States, subject only to the extinguishment of the Indian title, and that before the Indian title came into existence the said lands were public lands of the United States, having been granted to it by the treaty with France whereby the Louisiana Territory was purchased, and that the Indian title has been extinguished; that upon the extinguishment of such Indian title the said lands so granted to your petitioner remained, as before, a part of the public lands of the United States, and were by said Act of Congress of the United States of July 25, 1866, granted to your petitioner. Your petitioner shows that it was the duty of the United States, upon the extinguishment of the Indian title, to have recognized and enforced its grants to your petitioner, as it had solemnly covenanted to do, by setting aside to it the granted lands and to cause certificates or patents to be issued to it for such lands. Your petitioner says that when said lands covered by its land grants were surveyed and the sections identified by number, range, and township, as other public lands of the United States, then the grants of said lands to your petitioner specifically attached to the odd numbered sections within the granted limits, and in case of deficiency, to the even-numbered sections within said limits necessary to make up such deficiency; that when said surveys were made and the grants to your petitioner made specific, and when the Indian title was extinguished, the said lands granted became a part of the public lands of the United States and were granted to your petitioner as aforesaid.

"Your petitioner shows that by the failure and refusal of the United States to recognize the land grants to your petitioner upon the extinguishment of the Indian title and to cause the lands granted to be certified and patented to your petitioner, and that by the acts of Congress of the United States and of the executive department thereof in setting aside and conveying said granted lands to other persons, the United States broke the covenants contained in its land grants and became liable to your petitioner for damages for the violation of the covenants of said grants for the value of the granted lands. Your petitioner states that it is advised and believes that upon the extinguishment of the Indian title it then became entitled to the possession of the lands granted and to the title of the lands granted by relation as from the date of the grant, but at all events avers that it became entitled to the lands granted as from the date of the extinguishment of the Indian title; that the extinguishment of the Indian title to the lands granted has been within less than six years last past, and that such extinguishment was effected by patents or deeds to allottees, purchasers and others. Your petitioner shows that, by reason of the breaches of the covenants of the United States contained in its land grants to your petitioner as aforesaid and of the future breaches thereof which it has determined to make by conveying any of the lands now unallotted or any of the townsites now unsold to allottees, purchasers and others, the United States has broken the covenants of the grants to your petitioner, and your petitioner is entitled in this action to recover as for a breach by the United States of the entire covenants contained in its land grants to your petitioner.

"Your petitioner states that it is the owner of the

claim herein sued upon, and that no other person or parties are interested therein, and that no assignment or transfer of said claim or any part thereof or any interest therein has been made, and that the claimant is justly entitled to the amount herein claimed from the United States after allowing all just credits and offsets, and that the claimant is a resident of the State of Kansas and a citizen of said State and a citizen of the United States.

"Wherefore, the premises considered, your petitioner prays that an account may be taken, ascertaining the extent of its land grants from the United States in the Indian Territory under the act of Congress of July 25, 1866; the number of acres contained therein; the value of such lands at the date of the extinguishment of the Indian title by deeding and patenting the lands to others than your petitioner; what lands have been allotted, what lands are to be allotted, what lands have been sold as townsites and what remain to be sold and the value thereof, what granted lands, if any there are, to which the Indian title has not been extinguished, and what of the granted lands have been reserved from allotment; and for such other and further relief as it is competent for a court of equity to give, and finally for a judgment against the United States of America for sixty-one million, two hundred and eighty-seven thousand, eight hundred ($61,287,800) dollars."

ASSIGNMENT OF ERRORS.

1. The Court erred in sustaining the demurrer to the claimant's Petition.

2. The Court erred in dismissing the Petition after the claimant had notified the Court that it had no amendments to propose to the Petition.

3. The Court erred in holding that in the lands in the Indian Territory granted to the claimant by the Act of July 25, 1866, the Indian title was never extinguished within the meaning of Section 9 of that act.

4. The Court erred in holding that the lands in the Indian Territory granted or contracted to be granted to the claimant never became public lands within the meaning of the ninth section of the said act.

5. The Court erred in holding that the subvention of the Indian title by means of treaty stipulation, or by the facts and circumstances which did occur, changed the character of the lands and that they were no longer part of the public domain, subject to disposal under general laws and did not pass under land grant laws, even though not expressly reserved.

6. The Court erred in holding that the successive acts by which the Indians received their allotments in severalty were in effect agreements between the Indians and the United States.

7. The Court erred in holding that Congress, knowing the difficulties attendant upon the extinguishment of Indian title and the acquirement of their lands, was not willing to rest the grant of 1866 upon that contingency alone, but added, as precautionary legislation, a clause which in nowise limited them in extinguishing Indian title, but did exempt them from liability if forced to extinguish it in a manner whereby the United States acquired nothing in property.

8. The Court erred in holding or assuming that the United States was forced in any way to extinguish the Indian title.

9. The Court erred in holding that the Government was willing, and by the language of the Act of July

25, 1866, intended to grant to claimant the lands mentioned in the act if the United States could discharge its obligations to the Indians and acquire this land without loss to itself or incurring liabilities to any extent.

10. The Court erred in holding that the particular portion of lands falling within the grant, which were not allotted to the Indians, are not subject to the claimant company's grant.

11. The Court erred in holding that such portion of said lands as were surveyed, platted and disposed of for townsite purposes, or which are still held by the Government for townsite purposes, and the coal, asphalt and mineral lands, leased and disposed of, or still held by the Government, being surplus lands over the allotments, are not subject to the claimant company's grant.

12. The Court erred in holding that the lands disposed of for cemetery purposes, or the mineral lands within the limits of the grant to the claimant of July 25, 1866, and the lands granted gratuitously to churches, jails and other public buildings, never became public lands within the meaning of the ninth section of the act.

13. The Court erred in holding that the Indian title was not extinguished in the surplus lands over and above what were allotted to the Indians, and that the same did not become public lands, including the lands before specified applied to other purposes than allotment, and the lands allotted to intermarried whites and former negro slaves.

14. The Court erred in holding that no part of the consideration for the lands disposed of to others than Indians ever reached the treasury as funds belonging

to the United States and that this prevented the Indian title from being extinguished in such lands and prevented the same from becoming public lands.

15. The Court erred in holding that the status of "these people" having been fixed by Indian laws, it was carried into the agreement as to allotment.

16. The Court erred in holding that there rested upon the United States no implied obligation to extinguish the Indian title, so that the grant to the claimant might attach.

17. The Court erred in holding that the United States, having prevented and made impossible of performance the conditions it agreed to perform, must not or need not respond to the claimant in damages.

18. The Court erred in holding that the case is different from an ordinary executory contract, where one party refuses or renders himself unable to perform a condition he impliedly engaged to perform, and that it cannot be asserted that the United States impliedly engaged itself to extinguish the Indian title within a reasonable time, and that the performance of its engagement to extinguish the Indian title was reserved exclusively to the grantor indeterminately.

19. The Court erred in holding that the United States recognized in the second condition, namely, that the lands should become public lands, its right to extinguish the Indian title without incurring liability.

20. The Court erred in holding that the Government, by the three separate treaties, signed April 28, 1866 (14 Stat., p. 769), June 14, 1866 (14 Stat., p. 785), and July 19, 1866 (14 Stat., p. 799), covenanted to secure said Indians in their title to their lands and that when-

ever it was for their best interests, the same should be allotted in severalty among them.

21. The Court erred in holding that the petition of the claimant states no cause of action against the United States.

22. Error in dismissing claimant's Petition for each and all of the reasons set forth in the opinion of the Court.

23. The Court erred in not holding that the United States, under the treaty with the First Consul of France for the Louisiana Purchase, including the Indian Territory involved in this case, became the absolute owner in fee-simple of all the lands embraced within such territory.

24. The Court erred in not holding that the United States, by removing into the Indian Territory the five so-called Civilized Tribes of Indians, or by any other of its acts and dealings with Indians, did not part with or impair its fundamental title in fee-simple, which it had acquired from France, to all the lands in the Territory.

25. The Court erred in not holding that the United States had given to the Indians nothing more than the right of occupancy so long as they continued to exist as nations and as nations to live upon it; and that no title or even right of occupancy was given to any individual Indian in any part of the lands and no power of disposition to the tribes or to any individual members thereof.

26. The Court erred in not holding that no other right in the Indians had attached to the land, or to any part of it at the time of the grant to the claimant company by the Act of July 25, 1866, except the Indian title, which for more than two hundred years

had been continuously recognized as nothing but the right of occupancy within limits defined either by treaty or by patent or by prescription.

27. The Court erred in not holding that by the eleventh section of the Act of July 25, 1866, the United States explicitly and in express terms contracted with the claimant the exclusive right of building the road from north to south through the Indian Territory from Kansas to Texas, with grants of land according to the provisions of the act, being the same as provided in the first section of the act, whenever the Indian title should be extinguished by treaty or otherwise, not to exceed the ratio per mile granted in the first section of the act, provided that said lands became a part of the public lands of the United States.

28. The Court erred in not holding that the reference in said eleventh section to the first section of the act is limited to the quantity of land granted or contracted to be granted, and that nothing has happened to make any of the other limitations contained in the first section apply to the lands in the Indian Territory and there has been no reservation for any other purpose than the occupancy of the Indians and no exception from the grant on any other account.

29. The Court erred in not holding that the United States, nearly twenty years after the passage of the act, and more than ten years after the railroad had been constructed and had been run for the benefit of the Government as well as of the company, as agreed by the terms of the act, could not deprive the claimant of its vested rights in the lands in controversy by adopting a new policy in complete reversal of that which had been pursued from the foundation of the Government, such new policy being to break up the

Indian tribes and their communal title; to cease to recognize them as tribes at all; to convert them into individual citizens of the United States and to allot to each individual Indian in fee so many acres as it should decide.

30. The Court erred in not holding that for any such purpose, the Government could not exercise the power of allotment without extinguishing the Indian title described in the ninth section of the act and converting the entire body of lands into public lands, as they had been before the Indians were removed into them.

31. The Court erred in not holding that the Government could not, by means of the various acts and proceedings had and taken by it to effectuate this new policy, successfully deprive the claimant of its vested right in the lands, or to due compensation therefor.

32. The Court erred in not holding that the Dawes Commission, after its appointment in 1893, began negotiations with the Five Tribes, but failed for some years to arrive at any agreement with them and reported in 1894 that they found unanimity among the people against the cession of any of the lands to the United States and the commission had abandoned all idea of purchasing any of it and determined to offer them an equal division of all their lands.

33. The Court erred in not holding that the statutes in question adopted for carrying out the scheme of the Government and the actions of the executive departments of the United States thereunder, proved that the intention of the Government was to grant and guarantee to the individual Indians and other allottees and purchasers, the entire title to said lands, a title which should include or destroy that of the United

States, the communal possessory rights of the Indian nation or tribes and individual Indians and the reversionary or remainder estate or title previously granted or promised to the claimant; and that such plan could not be carried out by mere force of statute, or even by agreement with the Indians so as effectually to destroy the vested or contract right of the claimant in the lands or the right to due compensation therefor.

34. The Court erred in not holding that all of said legislation was not in the nature of contract or in pursuance of contract between the United States and the Indians, but was by pure force of the arbitrary power of the United States in the premises.

35. The Court erred in not holding that the joint resolution of Congress of March 6, 1906, to the effect that the tribal existence and then present tribal government of the said tribes or nations, were to continue in full force and effect for all purposes under existing laws until all property of such tribes, or the proceeds thereof, shall be distributed among the individual members of said tribes, unless otherwise provided by law, had no effect whatever to impair or defeat the rights of the claimant in the lands in question or to due compensation therefor.

36. The Court erred in not holding that this joint resolution could not restore the tribal title, subject to which the claimant claims, or restore the tribal existence of the nations, or convert the present holdings of the Indians into anything but individual holdings guaranteed to them by the United States for the sole purpose of destroying the claimant's rights.

37. The Court erred in not holding that the formal continuation, by such a retroactive Act of Congress, of the existence of the tribes and of the tribal or com-

munal title after the injury had been done, after the contract with the claimant had been broken and the lands conveyed to the individual Indians to whom they were allotted, or otherwise sold or disposed of, can be of no legal effect as against the claimant, or alter the fact of the breach of its contract by the United States and the liability of the United States to make due compensation to the claimant.

38. The Court erred in not holding that the legal effect of the acts of the Government of the United States set forth in the petition was to simultaneously extinguish the Indian title and to make the lands public lands of the United States subject to the claimant's grant.

39. The Court erred in holding that the scheme of the Government could be carried through so as to deprive the claimant of its right to the lands in question or to due compensation therefor, through deeds dictated by the Secretary of the Interior and delivered to the various allottees, with the provision that in case of failure or refusal after notice that any instrument was ready for signature by the chief of the tribe to appear and execute the same, the instrument should be approved by the Secretary of the Interior without such execution and when so approved and recorded, should convey legal title and such approval should be conclusive evidence that such executive or chief refused or neglected, after notice, to execute such instrument.

40. The Court erred in not holding that such scheme and provision could have no legal effect against the rights of the claimant, and, as against it, was wholly unconstitutional and void.

41. The Court erred in not holding that the provi-

sion of the Curtis Act, that the patents to allottees should convey all the right, title and interest of the Cherokee Nation and of all other citizens, in and to the lands embraced in the allotment certificate, was unconstitutional and void as to this claimant and could have no legal effect upon the rights of this claimant to the lands in question, or to due compensation therefor.

42. The Court erred in not holding that the provision in the Curtis Act that allotment certificates issued by the Dawes Commission shall be conclusive evidence of the rights of an allottee to the tract of land described therein, and the further provision that the acts of the Indian agent—the officer representing the United States in the premises—shall not be controlled by the writ of process of any court, were each unconstitutional and void and could have no legal effect as against the rights of the claimant to the land in question or to due compensation therefor.

43. The Court erred in not holding that the acts on the part of the Government which stripped the claimant of the land granted, or contracted to be granted, to it cannot have the effect to remit the claimant to a claim of ejectment against the individual allottees or purchasers or present holders of the land in question, the United States having, in defiance of their contract with the claimant, refused to convey to it, but by the exercise of purely arbitrary power, having granted to other people the lands with a covenant to warrant and secure the same to them and having, as to them, by express enactment, denied to the claimant the writ or process of any court.

44. The Court erred in not holding that the Government could not carry out its scheme, however bene-

ficial for the country or for the Indians themselves, at the expense of the claimant and take away its lands or right of compensation therefor, any more than they could have deprived it of the same constitutional rights by devoting the lands contracted to be conveyed to it to any other scheme of public utility.

45. The Court erred in not holding that the United States, having designedly prevented the happening of the conditions precedent upon which the claimant's title was, under the Act of July 25, 1866, to become consummated, cannot now insist upon a strict compliance with the conditions.

46. The Court erred in not holding that the United States, whether by contract with the Indians or by its own absolute power, having deprived the claimant of the lands which were contracted to be conveyed to the claimant on the happening of conditions, the performance of which it has rendered impossible, is bound to make compensation to the claimant for the value of such lands.

47. The Court erred in not holding that in respect to all the lands covered by the claimant's grant, which have not been allotted to the Indians, whether for townsites, coal and asphalt lands, mineral lands, lands designated for churches, schools and charities, and lands allotted white men, negroes and freedmen, not Indians at all, or for any other purposes, the Petition sets forth a good cause of action and that the claimant is entitled to recover the value of such lands as have already been disposed of by the Government.

48. The Court erred in not holding that the Petition sets forth a good cause of action as to that portion of the lands covered by the claimant's grant which

remain in the possession of the United States undisposed of.

49. The Court erred in not holding that as to all such lands not allotted to the Indians, the United States dealt with them as public lands, treating them as lands which were at the absolute disposal of the United States unencumbered by any Indian title.

50. The Court erred in not holding that charities and benevolences, even for the Indians, could not be legally or constitutionally provided for out of the lands not allotted to the Indians covered by the claimant's grant at the expense of the claimant, and that the Petition, in respect to all such properties, states a good cause of action in the claimant.

51. The Court erred in refusing to hold that it makes no difference whether the grant to the claimant was a grant *in praesenti* or a grant *in futuro*, or merely an agreement to convey on certain conditions precedent, for that, in either case, there was a right of property secured to the claimant and in all the lands not allotted to the Indians, the Government, having taken the claimant's property, is bound to make compensation therefor.

52. Error in not holding that the United States, at the time of the grant, owned the paramount and ultimate title to the lands in the Indian Territory, subject only to a communal right of occupancy in the Indian tribes as such, and that the United States granted the lands *in praesenti* to the claimant, subject only to the extinguishment of such Indian title, and further erred in not holding that upon the extinguishment of such Indian title the lands became the public lands of the United States, as alleged in the petition, and passed to the claimant under the terms of the grant to it

53. The Court erred in not holding that there was a grant of land through the Indian Territory subject to the extinguishment of the communal or possessory rights of the Indian Tribes, as alleged in the petition.

54. The Court erred in not holding that the Indian tribes or nations within the Indian Territory never acquired the fee-simple title to the lands covered by the grant under any of the Indian treaties and patents, as alleged in the Petition.

55. The Court erred in not holding that the lands in question were surveyed as other public lands of the United States.

56. The Court erred in not holding that the United States, by disabling itself from carrying out and making effective the grant to the claimant, and by allotting and selling the granted lands and reserving other lands from allotment and disposing thereof for townsite and other purposes in the manner set forth in the Petition, violated the grant to the claimant, and thereby was concluded and estopped from making use of the proviso of Section 9 of the grant, to defeat the claim of the claimant.

57. The Court erred in not holding that the United States had no right to extinguish the railroad title as well as the Indian title, merging the whole title again in the United States, and then patenting the same to the individual Indians, not as Indians, but as citizens of the United States, thereby conveying and granting unto the Indians a new and greater estate, including the title and interest of the claimant and the reserved title and interest of the United States.

58. The Court erred in not holding that the claimant became entitled to the possession of the lands granted, as well as the title to said lands theretofore granted, by

relation, as from the date of the grant, upon the extinguishment of the Indian title.

59. The Court erred in not holding that, whether or not there was a grant of land *in praesenti* or *in futuro*, the United States, by virtue of Section 11 of the act, expressly agreed to grant the lands to the claimant upon the extinguishment of the Indian title and breached said contract.

60. The Court erred in not holding that the United States had no reserved power to defeat the land grant to the claimant by extinguishing the national or tribal title, and by allotting and patenting the lands to the Indians and their individual purchasers in fee-simple, including the estate granted to claimant.

61. The Court erred in not holding that, under the 1866 Indian treaties and patents, the individual Indians were not entitled to allotment of the lands in fee-simple, or by any different or higher title or estate or tenure to the lands than a right of possession in severalty, and that the only allotment contemplated by any of said treaties or patents was an allotment of possessory rights to given tracts of land, instead of common possession of the whole of the lands, and in not holding that the allotments made were in violation of the rights of the claimant.

62. The Court erred in not holding that the Congress of the United States, by various acts, subsequent to the grant to the claimant, recognized its grant as claimed, but, instead of carrying it out and making the same effective, elected to make good to the claimant its loss by reason of granting the lands in fee-simple to others.

63. The Court erred in not holding that the proviso in Section 9 was only a limitation upon the preceding

proviso or provision, namely, "Not to exceed the ratio per mile granted in the first section of this act."

64. The Court erred in not holding that the United States had no right to change or vary the terms of the grant by subsequent legislation in violation of the Fifth Amendment to the Constitution of the United States.

ARGUMENT.

The errors assigned are designed to cover both in affirmative and negative form the entire decision of the Court of Claims, and thus bring into review the appellant's entire case as set forth in its Petition and that Court's decision thereon. They will not be discussed herein in detailed order, inasmuch as it is plain that the appellant company's claim for compensation arises upon the grant and contract set forth in the Act of Congress of July 25, 1866. Its right to such recovery must stand or fall upon the determination of the dominant question whether there was such grant or contract in law, and whether the United States has failed to keep its solemn agreement thereunder, and taken our property for a public purpose, for as said by this Court in the "*Sinking Fund Cases*," (99 U. S., pp. 700, 719):

> "The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen. No change can be made *in the title created by the grant of lands*, or in the contract for the subsidy bonds, without the consent of the corporation. All this is indisputable." (Italics ours.)

The suit is brought under the Act of March 3, 1887, known as the "Tucker Act". The jurisdictional scope of that Act is clearly defined by this Court in *Dooley* v. *United States*, 182 U. S. 222, 223, where the Court held:

> "By an act passed March 3, 1887, to provide for

the bringing of suits against the Government, known as the Tucker Act, 24 Stat. 505, c. 359, the Court of Claims was vested with jurisdiction over 'first, all claims founded upon the Constitution of the United States, or any law of Congress, except for pensions, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity or admiralty, if the United States were suable;' and by section 2 the District and Circuit Courts were given concurrent jurisdiction to a certain amount.

"The first section evidently contemplates four distinct classes of cases: (1) those founded upon the Constitution or any law of Congress, with an exception of pension cases; (2) cases founded upon a regulation of an executive department; (3) cases of contract, express or implied, with the Government; (4) actions for damages, liquidated or unliquidated, in cases not sounding in tort. The words *'not sounding in tort' are in terms referable to the fourth class of cases*" (Italics ours).

Many cases ruled in this Court are cited and discussed as sustaining the conclusion thus expressed.

From the recitals and averments of the petition herein, it is plain that the appellant company's case as therein set forth is expressly founded—

1. Upon a law of Congress, *i. e.*, the Act of July 25, 1866, making the grant of lands;

2. Upon the contract which that act makes in plain terms between the United States and this appellant

company and its full and seasonable execution on the part of the appellant.

3. Upon the Constitution, inasmuch as the appellant company fully and clearly pleads a right to property which has been taken and used by the United States for public purposes, and in execution of a public policy originated and so executed *after* the passage of the Act of July 25, 1866, *supra*, and the making of the contract in and by that act, whereby the right to compensation for the value of the property so taken has accrued to the appellant company under the Fifth Amendment to the Constitution, and the United States is under the implied obligation to pay such compensation.

United States v. Great Falls Manufacturing Co., 112 U. S. 645;
United States v. Lynah, 188 U. S. 445.

The statement of the appellant company's claim and case as thus made was met by the Government's demurrer upon the stated grounds (1) "That the matters complained of are not within the jurisdiction" of the Court of Claims, and (2) "That the petition does not allege facts sufficient to constitute a cause of action" falling within "the jurisdiction" of that court (R., p. 705).

The Court of Claims has decided the case adversely to the appellant company upon the *merits*. To reach that result it necessarily took jurisdiction "to hear and determine". The Government's demurrer was not sustained upon any suggestion of lack of jurisdiction in that court *to hear and determine* the claimant's cause. *Contra*, and as clearly appears from the Court's extended opinion (R., pp. 705-717), the express reasoning and conclusion thereof was that the

Petition failed to state a cause of action whereon the claimant could recover, and on *that* ground the demurrer was sustained. The extended concurring opinion of one of the Justices discusses the case as set forth in the Petition, and whilst concluding that the Court was without jurisdiction to render judgment for the claimant, it is obvious from the reading thereof that like the decision of the Court his adverse conclusion was not founded on denial of the jurisdiction of the Court to *consider* the case as presented, but because of lack of a ca-e set forth by the petition to justify an affirmative judgment in claimant's favor *upon* consideration.

It is therefore plain that the case as presented and decided below was and is one of inherent jurisdiction, because plainly founded by the express averments of the petition, upon (1) the Constitution; (2) a law of Congress; (3) contract, whereunder, in the language of the jurisdictional act (24 Stat. 505), the claimant "would be entitled to redress against the United States either in a court of law, equity or admiralty, if the United States were suable".

These jurisdictional grounds are not mere assertions of the pleader, but direct averments of facts, under which if sufficient in law the United States is bound to make compensation. The denial of the asserted conclusions is not denial of the jurisdiction of the Court to hear and determine them, but simply that assuming the facts as pleaded, the obligation of the United States to re-pond in compensation, does not, in the judgment of the Court of Claims, exist. That court did not hold that the claimant is denied access to or hearing in the forum wherein its claim was presented, but solely that on the facts so presented

the asserted liability of the Government does not exist. That was the exercise of jurisdiction. It can be nothing less. Such is the long settled rule, based upon plain reasoning and clear judicial authority.

Thus in *Grignon v. Astor*, 2 How. 319, 338, the Court said:

> "The power to hear and determine a cause is jurisdiction; it is *coram judice* whenever a case is presented which brings this power into action; if the petitioner presents such a case in his petition, that on a demurrer the Court would render a judgment in his favor, it is an undoubted case of jurisdiction; whether on an answer denying and putting in issue the allegations of the petition, the petitioner makes out his case, is the exercise of jurisdiction conferred by the filing of a petition containing all the requisites, and in the manner required by law." 6 Pet., 709. "And movement by a Court is necessarily the exercise of jurisdiction; so to exercise any judicial power over the subject-matter and the parties, the question is whether, on the case before a court, their action is judicial, or extra judicial, with or without the authority of law, to render a judgment or decree upon the rights of the litigant parties. If the law confers the power to render a judgment or decree, then the court has jurisdiction; what shall be adjudged or decreed between the parties, and with which is the right of the case, is judicial action by hearing and determining it." 12 Pet. 718; S. P., 3 Pet. 205. "It is a case of judicial cognizance, and the proceedings are judicial. 12 Pet. 623."

In *United States v. Arredondo*, 6 Pet. 691, 709, the Court said:

> "The power to hear and determine a cause is

jurisdiction; it is *coram judice*, whenever a case is presented which brings this power into action; if the petitioner states such a case in his petition that on a demurrer the Court would render judgment in his favor, it is an undoubted case of jurisdiction, whether on an answer denying and putting in issue the allegations of the petition, the petitioner makes out his case, is the exercise of jurisdiction conferred by the filing of a petition containing all the requisites and in the manner prescribed by law. The proceedings on the petition are to be conducted according to the rules of equity, except that the answer on behalf of the United States need not be verified on oath."

In *Illinois Central Railroad Company v. Adams*, 180 U. S. 28, 34-35, the Court said:

"Jurisdiction is the right to put the wheels of justice in motion and to proceed to the final determination of a cause upon the pleadings and evidence. It exists in the circuit courts of the United States under the express terms of the Act of August 13, 1888, if the plaintiff be a citizen of one State, the defendant a citizen of another, if the amount in controversy exceed $2,000, and the defendant be properly served with process within the district. Excepting certain *quasi*-jurisdictional facts, necessary to be averred in particular cases, and immaterial here, these are the only facts required to vest jurisdiction of a controversy in the circuit courts. It may undoubtedly be shown in defense that plaintiff has no right under the allegations of his bill or the facts of a case to bring suit, but that is no defect of jurisdiction, but of title. It is as much so if it were sought to dismiss an action of ejectment for the want of jurisdiction by showing that the plaintiff had no title to the land in controversy. At com-

mon law neither an infant, an insane person, married woman, alien enemy, nor person having no legal interest in a cause of action, can maintain a suit in his or her own name; but it never would be contended that the court would not have jurisdiction to inquire whether such disability in fact existed, nor that the case could be dismissed on motion for want of jurisdiction. The right to bring a suit is entirely distinguishable from the right to prosecute the particular bill. One goes to the maintenance of any action; the other to the maintenance of the particular action. Thus it was held in the cases of *Smith v. McKay* (161 U. S. 355) and *Blythe v. Hinckley* (173 U. S. 501), that it was not a question of the jurisdiction of a circuit court that the action should have been brought at law instead of in equity. The question in each case is whether the plaintiff has brought himself within the language of the jurisdictional act, whatever be the form of his action, or whether it be at law or in equity."

In *Van Fleet on Collateral Attack*, Sec. 60, it is said:

"Jurisdiction always depends upon allegations, never upon the facts. When a party alleges that a certain right is denied him, and the law has given a tribunal power to enforce that right, it must proceed to determine the truth or falsity of the allegations. The truth of the allegations does not constitute jurisdiction. The tribunal must have jurisdiction before it can take any adverse step. Its jurisdiction necessarily depends upon the allegations, assuming them to be true."

It hence results that in stating its justiciable case in the court below, the claimant there and appellant here clearly plead a state of facts which, met by the Government demurrer, required hearing and determina-

tion of the *merits* of its claim. The court below upon consideration of the facts denied its claim or right to recover thereon *in law*. The correctness of that court's conclusion is of course the material matter for hearing and determination here.

Much effort was expended by defendant's counsel below in seeking to demonstrate that the claim was one "*sounding in tort*", and hence excluded from the jurisdiction of the Court of Claims. In thus contending it was necessarily admitted *arguendo* that the Congress, the Executive, and all concerned in the business, were *tort feasors*, and had, in such view, committed wrongs against the petitioner and claimant, which, while justiciable as between private parties, could not be pursued as against the United States, because excluded from the jurisdiction of the Court of Claims. The contention and the argument did not of course rest upon grounds of exalted morality, for under the state of facts disclosed by the Petition here, the denial of all remedy could not be commended as an example of high public justice. We here only concretely suggest that decisions of this Court will be found which clearly draw the sharp distinction between cases "not sounding in tort" and those which do. In those decisions the distinction is clearly drawn between the cases wherein no contract *whatever* or semblance thereof existed, and those wherein such contract, express or implied, was made to appear. Thus, cases are found decided wherein the United States merely exercised ownership over its own property and through its appropriate officers in committing the acts complained of, such as *Langford v. United States*, 101 U. S. 341, and *Hill v. United States*, 149 U. S. 593, wherein there was total lack of any pos-

sible claim of privity by contract or otherwise between the United States and the claimants, and wherein the acts of the Government officers on which the claims were founded were held clearly tortious, and hence as excluding the claim from cognizance in the Court of Claims. *Contra*, in the *Great Falls Mfg. Co.*, and *Lynah* cases, *supra*, involving the taking of private property for public use, as well as in several others involving the adoption and use of the claimant's patented invention, this Court held that there existed an *implied* contract arising from such taking, to pay for the property so devoted to a public use. In all the cases the line of demarcation is observed between rights asserted as arising *ex contractu*, and those resting on mere unauthorized acts of Government officers wherefrom no relation of contract obligation, express or implied, could be found or inferred. In this case the attempt to escape liability upon the ground that the cause of action involves a tort necessarily charges the Congress and the Executive with wrong-doing, quite contrary to Lord Macauley's famous declaration that you cannot indict a whole nation.

Finally, however, as we plead and show that our case and claim is founded on an express Act of Congress which is in form and legal effect a *contract*, admittedly having *some* meaning, between the United States and the appellant company, and assert as well that our property was taken by the Government for a public purpose, and for which we are entitled to just compensation, it is manifest that our claim is one "not sounding in tort", as that term is limited by the decision of this Court in *Dooley v. United States*, 182 U. S. 222, cited *supra*, as "in terms referable only to the fourth class of cases", namely, "for damages,

liquidated or unliquidated". Breach of contract and recovery of damages therefor is not a case "sounding in tort". Indeed, as the taking of private property for public use implies the promise to pay therefor (as this Court holds in the cases cited *supra*) then if our property was so taken we may recover its just value and cannot be deprived of such recovery upon the contention that the Government acting through both the Congress and the Executive has simply committed a mere tort against us, even though we did not also distinctly found our claim and demand upon an *express* contract.

II.

THE MERITS.

Orderly discussion requires consideration of

FIRST.

The nature of the Indian title to the lands in the Indian Territory when the grants here in question were made.

The United States, at the time of the grant, owned the paramount and ultimate title to the lands in the Indian Territory under its purchase from France in 1803, subject only to the right of occupancy in common of the Indian tribes and nations under the Indian treaties and patents and, as such owner, the United States had the unquestioned power to grant the lands to the Railroad Company.

SECOND.

The meaning and effect of the grants of lands, as made by the Acts of July 25th and 26th, 1866.

THIRD.

The Land Grant must be considered in the light of the history of the times and the condition of the country; what the parties to the grant had reason to believe it meant, and the purposes in view in making and accepting the grant.

It must be viewed as a law in the nature of a statutory contract. It must be liberally construed in favor of the company that accepted the proposition of the government, relied upon, and fully executed it.

FOURTH.

The grant was a grant *in præsenti*. Every condition of the grant was complied with by the Railroad Company, and, upon the extinguishment of the Indian title, the lands became a part of the public lands of the United States, and the government, by breaching the grant, elected to respond in damages.

FIFTH.

The government's contention that the Land Grant could not operate as a grant *in præsenti*, because the lands were not surveyed at the time of the location and construction of the road, is without foundation and unsupported by any of the authorities. Indeed, the Court of Claims so ruled.

SIXTH.

The grant in question was of "lands through the Indian Territory". The grant of the right-of-way through the Indian Territory was a grant of the same nature and in practically the same terms as the grant of lands.

SEVENTH.

The lands in question have been surveyed, as other public lands.

EIGHTH.

The grant in question constituted a contract between the United States and the Railroad Company, whether considered a grant *in praesenti*, or a grant *in futuro*.

NINTH.

The United States, by disabling itself from carrying out and making effective its grant to the Railroad Company, and by allotting and selling the granted lands, violated the grant to the Railroad Company, and is concluded and estopped from making use of the proviso in section 9 of the grant, to defeat the claim of the Railroad Company, as no party to a contract can insist on the fulfillment of a condition, the happening or execution of which it renders impossible.

TENTH.

The facts stated in the petition constitute a cause of action within the jurisdiction of the Court of Claims, and that court should have overruled the demurrer.

ELEVENTH.

The acts and doings of the United States through acts of Congress and executive action thereunder since the stated acts of Congress of 1866 were passed, whereby such latter acts, treated as laws, were in legal effect annulled, and considered as a contract were in legal effect repudiated.

TWELFTH.

The decision of the Court of Claims.

FIRST.

The nature of the Indian title to the lands in the Indian Territory when the grants here in question were made.

The United States, at the time of the grant, owned the paramount and ultimate title to the lands in the Indian Territory under its purchase from France in 1803, subject only to the right of occupancy in common of the Indian tribes and nations, under the Indian treaties and patents and, as such owner, the United States had the unquestioned power to grant the lands to the Railroad Company.

The treaties and patents with the Indian tribes and nations were practically all alike. The title in them was in their tribal capacity. It was what is known as the *Indian title*, subject to the paramount title of the Government of the United States. The Indian title was to last only so long as the tribes should exist as Indian nations and, as nations, live on the lands. The lands were to revert to the United States if the nations should become extinct or abandon the lands.

Louisiana Purchase Treaty, Exhibit 1, Book of Exhibits, page 1, *et seq.*;
Fletcher v. Peck, 6 Cranch. 87;
Johnson v. McIntosh, 8 Wheat. 543;
Cherokee Nation v. Georgia, 5 Peters 17-48;
Martin v. Waddell, 16 Pet. 367;
Pollard v. Hagan, 3 How. 212;
Irvine v. Marshall, 20 How. 558;
United States v. Cook, 19 Wall. 591;
L. L. & G. Ry. Co. v. United States, 92 U. S. 733;

M. K. & T. Ry. Co. v. United States, 92 U. S. 733;
Beecher v. Weatherby, 95 U. S. 517;
M. K. & T. Ry. Co. v. Roberts, 152 U. S. 114;
Jones v. Meehan, 175 U. S. 1;
St. P. M. & M. Ry. v. Phelps, 137 U. S. 528;
Clark v. Smith, 13 Pet. 195;
Fleming v. McCurtain, 215 U. S. 56;
Choate v. Trapp, 224 U. S. 665;
Kindred v. Union Pac. R. R., 225 U. S. 582;
Heckman v. United States, 224 U. S. 413;
Veale v. Maynes, 23 Kan. 1;
Opinion of the Court of Claims in this case.

It was competent for the Government to pass its title by treaty or statute.

Mitchell v. United States, 9 Pet. 711;
United States v. Payne, 8 Fed. 883;
Jones v. Meehan, 175 U. S. 1.

In *Fletcher v. Peck*, 6 Cranch. 87, the Supreme Court for the first time had occasion to consider and determine the nature and meaning of "Indian Title", and there held that it was a mere right of possession and that it was no impediment to a grant by the State of Georgia of lands to its citizens, and that the fee-simple title was in the State, notwithstanding such right of possession in the Indians. Mr. Chief Justice Marshall said (p. 143):

> "The majority of the court is of the opinion that the nature of the Indian title which is certainly to be respected by all courts until it is extinguished, is not such as to be absolutely repugnant to seizin in fee on the part of the State."

In *Johnson v. McIntosh*, 8 Wheat. 543, the Supreme Court again, and for the second time had occasion to consider exhaustively the meaning of "Indian Title"

and it was held that a title to lands derived solely from a grant made by an Indian tribe to private individuals could not be recognized in courts of the United States, and in this opinion it was shown that from the discovery of America, the paramount absolute, fee-simple title was always considered and held to be in the Government making the discovery, and that the Indian title was a mere right of occupancy, and that the Indians had no alienable title which they could transfer or convey to any one and that the whole of the territory in the United States had been granted by different countries to different persons while in the occupation of the Indians and that almost every title within the confines of the United States is dependent upon grants so made. It is further shown that by the treaty which concluded the war of our revolution, Great Britain relinquished all claim, not only to the Government, but to property and territorial rights. The Court said (p. 585):

> "It has never been doubted that either the United States or the several states had a clear title to all the lands within the boundary lines described in the treaty, subject only to the Indian right of occupancy, and that the exclusive power to extinguish that right was vested in that government which might constitutionally exercise it."

The opinion further shows that the states having within their chartered limits different portions of territory occupied by Indians, ceded that territory generally to the United States, and that the ceded territory was occupied by numerous tribes of Indians, but "that the exclusive right of the United States to ex-

tinguish their title and to grant the soil has never, we believe, been doubted."

The Court further held (p. 587):

> "The magnificent purchase of Louisiana, was the purchase from France of a country almost entirely occupied by numerous tribes of Indians, who are in fact independent. Yet, any attempt of others to intrude into that country, would be considered as an aggression which would justify war. Our late acquisitions from Spain are of the same character; and the negotiations which preceded those acquisitions, recognize and elucidate the principle which has been received as the foundation of all European title in America. The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest: and gave also a right to such a degree of sovereignty as the circumstances of the people would allow them to exercise. The power now possessed by the Government of the United States to grant lands, resided, while we were colonies, in the crown, or its grantees. The validity of the titles given by either has never been questioned in our courts. It has been exercised uniformly over territory in possession of the Indians. The existence of this power must negative the existence of any right which may conflict with and control it. An absolute title to lands cannot exist, at the same time, in different persons, or in different governments. An absolute, must be an exclusive, title, or at least a title which excludes all others not compatible with it. All

> our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy, and recognize the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians."

In *Beecher v. Weatherby*, 95 U. S. 517, it is said that the doctrine announced in *Johnson v. McIntosh*, that the fee of all lands in the United States was in the United States, and only a right of occupancy in the Indians "had never been doubted", and that "possession when abandoned by the Indians attaches itself to the fee without further grant". And it was further held (page 525), that the United States had the right to dispose of the fee of lands occupied by Indians, and that that right had been recognized by the Supreme Court from the foundation of the Government.

In *Missouri, Kansas & Texas Railway Co. v. Roberts*, 152 U. S. 114, it was held that the United States had the right to grant to the Missouri, Kansas & Texas Railway Company a right-of-way 200 feet in width through the Osage Indian Reservation in Kansas. The Court said (p. 116):

> "Though the lands of the Indians were reserved by treaty for their occupation, the fee was always under the control of the Government and when transferred without reference to the possession of the lands and without designation of any use of them requiring the delivery of their possession, the transfer was subject to their right of occupancy."

It was further held that the grant of the right-of-way for railroad purposes was inconsistent with any reserved right of occupancy in the Indians as to the

right-of-way and, therefore, that the grant covered not only the fee, but the right of possession. The Court said (p. 117):

> "That grant was absolute in terms covering both the fee and possession and left no rights on the part of the Indians to be the subject of future consideration. * * * The right of the United States to dispose of the fee of land occupied by them (the Indians) has always been recognized by this Court from the foundation of the Government."

The Court further said (p. 118):

> "The right and power of the Government to dispose of the fee of the lands in controversy occupied by the Osage Indians, with their rights of occupancy, having been exercised and a grant of both fee and possession having been made to the Missouri, Kansas & Texas Railway Company, it follows that this company, the plaintiff in error, is entitled to a reversal of the judgment unless the claim of the plaintiff below, the defendant in error here, rests upon (other) tenable grounds, and to them we will now turn our attention."

In *Leavenworth, Lawrence & Galveston R. R. Co. v. United States*, 92 U. S. 733, it was expressly ruled that the Government could make a grant of Indian lands and the only question was whether or not the grant in question showed an intention so to do. In that case it was ruled that the Act of Congress in question clearly showed an intention to grant not only the fee, but the right of possession for a right-of-way through Indian lands.

Speaking of the power of Congress to grant Indian lands, the Court said (pp. 745-746):

> "Congress cannot be supposed to grant them by a subsequent law, general in its terms. Specific language, leaving no room for doubt as to the legislative will, is required for this purpose."

In our grant, there is a clearly disclosed intention on the part of Congress to grant Indian lands, leaving no room for doubt as to the legislative will.

In *St. Paul, Minneapolis & Manitoba Ry. Co. v. Phelps*, 137 U. S. 528, the grant was held to cover lands in an Indian Territory, because the grant showed the intention to do so, although the intention in that case is not nearly as clearly shown as in our case. In the Phelps case, the sixth section of the land grant provided "that in case any lands on the line of said road or branches are within any Indian Territory, no title to the same shall accrue, nor shall the same be entered upon by authority of said territory until the Indian title to the same shall have been extinguished." The Court construed this to be an affirmative grant of the lands in an Indian Territory, subject to the extinguishment of the Indian title. It will be noted that the language is somewhat negative, but was given an affirmative meaning. In our case, we have an affirmative grant of the Indian lands, subject only to the extinguishment of the Indian title.

In the *Phelps Case* the Court said (pp. 541, 542):

> "By that section the right of Minnesota to the lands within the Indian country was made somewhat in the nature of a float, to become vested when the Indian title was extinguished. When the road was definitely located and the Indian

title was extinguished, the land passed to the State for the benefit of the road."

In this case, there was no specific agreement on the part of the Government to extinguish the Indian title, but, the Indian title having been extinguished, it was held that the grant to the railroad attached without further grant.

In *L. L. & G. R. R. v. United States*, 92 U. S. 733, it was held that where, in a grant of lands, there is disclosed a clear intention to grant Indian lands, that, although nothing is said about the extinguishment of the Indian title, there is an implied obligation on the part of the Government to extinguish the Indian title. At page 743, the Court said:

> "This grant, however, if it took effect on these lands, carried with it the obligation to extinguish the Indian right. This will be conceded, if a complete title to them were granted; but it is equally true if only the fee subject to that right passed. It would be idle to grant what could be of no practical benefit unless something be done which the grantee is forbidden, but which the grantor has power to do. * * * As Congress cannot be supposed to do a vain thing, the present grant of the fee would be an assurance to the grantee that the full title should be eventually enjoyed."

In our case, we have a clearly disclosed intention to grant Indian lands subject only to the extinguishment of the possessory rights or Indian title, followed by an extinguishment of the Indian title. The language of our grant shows conclusively that Congress understood that it had granted the fee to the petitioner for it provides for a *reversion of the estate* for a failure on our part to comply with the conditions of the grant,

and that Congress construed the treaties with the several tribes of Indians and the patents as only giving them a possessory right is shown by the grant of the lands to us, subject not to a *reacquisition of the fee-simple title* of the lands by the Government, but only to an extinguishment of the "Indian title by treaty or *otherwise*." And by Act of Congress of 1893 hereafter quoted and more fully discussed, the United States agreed, upon making the allotments, to convey its reversionary estate to the allottees, and did so by the new patents issued to the allottees, although the reversionary or remainder estate had already been granted to petitioner.

In *Clark v. Smith*, 13 Pet. 195, it was held that a patent from the State of Kentucky of lands in the Indian country passed title to the patentee, subject to the Indian right of occupancy. The Court said (p. 201):

> "William Clark, the complainant, by various mesne conveyances, became the owner in fee of the same; and, by his tenant, has been in possession from 1819, up to the time of filing the bill; the claim of the Chickasaw Indians having been extinguished to the country where the land lies, by the treaty of the 19th of October, 1818; to which time the right of possession was necessarily suspended.
>
> "The first exception taken by the answer is, that the patent was made for lands lying within a country claimed by Indians, and, therefore void.
>
> "To which it may be answered that the colonial charters, a great portion of the individual grants by the proprietary and royal governments, and a still greater portion by the States of this Union after the Revolution, were made for lands within the Indian hunting grounds. North Carolina, and Virginia, to a great extent, paid their officers and

soldiers of the Revolutionary War, by such grants; and extinguished the arrears due the army by similar means. It was one of the great resources that sustained the war, not only by these States but others. The ultimate fee (incumbered with the Indian right of occupancy) was in the crown previous to the Revolution, and in the States of the Union afterwards, and subject to grant. This right of occupancy was protected by the political power, and respected by the courts until extinguished; when the patentee took the unincumbered fee. So this Court, and the State courts, have uniformly and often holden. 6 Cranch. 87; 9 Cranch. 11."

In Kindred v. Union Pacific R. R. Co., 225 U. S. 582, only recently decided, this Court held in an opinion by Mr. Justice Van Devanter that

> "*while the phrase 'public lands' is a term ordinarily used to designate lands subject to sale under general laws, it is sometimes used in a larger sense and, as used in Sec. 2 of the Act of July, 1862, it includes lands within Indian Reservations. Congress so intended and such has been the construction placed on the words by the Interior Department.*"

The facts in this case are quite similar to the facts in the case at bar, and in our case, in view of the decision in the Kindred case, there can be no doubt but what there was a grant of "Indian lands" *in praesenti* to the claimant company through the Indian Territory. As we have pointed out, ours was not a grant of "public lands" *eo nomine*, but was a grant of "*lands through the Indian Territory.*"

Sec. 1 of the act deals with the grant of lands in the State of Kansas, and, in Sec. 1 are the usual reserva-

tions found in grants of lands in the various States and Territories where it was assumed lines of railroad might pass through one or more small bodies of so-called reserved lands; but, to make it entirely clear, the Congress of the United States made the grant of "lands through the Indian Territory" in a separate and distinct paragraph. We respectfully submit that it is idle to contend, as counsel for the Government have contended, and as indeed the Court of Claims held, that the grant of lands through the Indian Territory under Sec. 9 of the act was subject to the reservations carved out of the grant of lands made in the State of Kansas. This is made the more manifest by Sec. 8 of the act, which covered both the grant of the *right to construct* the road through the Indian Territory and the grant of a right-of-way through the Indian Territory. In this section, the lands through the Indian Territory are referred to as "Indian lands", and the grant of the right-of-way is *in praesenti*—"is hereby granted" to said Company to the same extent as granted by the sixth section of this act, through the *public lands*.

As the opinion by the Court by Mr. Justice Van Devanter is short and controlling, we here quote it in its entirety:

> "The ultimate question to be decided on this appeal is whether the appellee, the Union Pacific Railroad Company, *has a right-of-way* 400 *feet* in width across certain lands in the State of Kansas, formerly within the *Delaware Diminished Indian Reservation*. The facts out of which the question arises are these:
>
> "By the treaty of 1829, 7 Stat. 327, with the Delaware Indians, it was provided that certain lands in the fork of the Kansas and Missouri Rivers should be '*conveyed and forever secured*'

to those Indians 'as their permanent residence.' By the treaty of May 6, 1854, 10 Stat. 1048, parts of the reservation so established were relinquished and the remainder retained for a *'permanent home.'* Article 11 of this treaty declared that at the request of the Delawares the diminished reservation *should be surveyed and each person or family assigned such portion as the principal men of the tribe designate*, the assignments to be uniform; and article 12 provided that railroad companies, when their lines of railroad necessarily passed through the diminished reservation, should have a right-of-way on payment of a just compensation. The treaty of May 30, 1860, 12 Stat. 1129, after reciting such a request as was contemplated by the preceding treaty, provided that 80 acres of the diminished reservation should be assigned and set apart for the exclusive use and benefit of each Delaware and his heirs; that the tracts assigned should not be alienable in fee, leased or otherwise disposed of, except to the United States, or to other members of the tribe, and should be exempt from levy, taxation, sale or forfeiture until otherwise provided by Congress; and that if any Delaware should abandon the tract assigned to him the Secretary of the Interior should take such action in respect of its disposition as in his judgment might seem proper. Article 3 of this treaty gave to the Leavenworth, Pawnee & Western Railroad Company, a Kansas corporation, a preferred right to purchase the unassigned lands in the reservation, and declared: 'it is also agreed that the said railroad company shall have the perpetual right-of-way over any portion of the lands allotted to the Delawares in severalty, on the payment of a just compensation therefor, in money, to the respective parties whose lands are crossed by the line of railroad.'

"The Act of July 1, 1862, 12 Stat. 489, c. 120, relating to the location, construction and maintenance of the Union Pacific and other railroads, authorized the Leavenworth, Pawnee & Western Railroad Company, before mentioned, to locate, construct and maintain a railroad from the Missouri River, at the mouth of the Kansas, to a connection with the Union Pacific Railroad on the 100th meridian of longitude in Nebraska, and granted to it, as also to other companies named in the act, a right-of-way in the following terms:

"'Sec. 2. That the *right-of-way through the public lands be*, and the same is hereby granted to said company for the construction of said railroad and telegraph line; and the right, power and authority is hereby given to said company to take from the public lands adjacent to the line of said road, earth, stone, timber and other materials for the construction thereof; said right-of-way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass over the public lands, including all necessary grounds for stations, buildings, workshops, and depots, machine shops, switches, sidetracks, and water stations. The United States shall extinguish as rapidly as may be the Indian titles to all lands falling under the operation of this act and required for the said right-of-way and grants hereinafter made.'

"Other portions of the act required the Leavenworth, Pawnee & Western Railroad Company to file with the Secretary of the Interior within six months after the date of the act an acceptance of its conditions and within two years after such date a map of the general route of its road, and to complete 100 miles, commencing at the mouth of the Kansas River, within two years after such acceptance, and 100 miles per year thereafter until com-

pletion; and made provision for an official examination and approval of the completed road in sections of 40 consecutive miles. The Company seasonably filed an acceptance of the conditions of the act and a map of the general route of its road showing that the route extended from the mouth of the Kansas River to and across the Delaware Diminished Reservation. That part of the road was constructed on that route and put into operation within two years from the date of the act, and was duly examined and approved by the proper officers of the United States. Under congressional authority the route for the remaining part of the road was subsequently changed so that the connection with the Union Pacific Railroad would be made at a point farther west than was originally intended, and the later construction conformed to this change, but this has no bearing here. The appellee, the Union Pacific Railroad Company, became in 1898, and now is the successor in interest and title of the Leavenworth, Pawnee & Western Railroad Company.

"By treaty of July 4, 1866, 14 Stat. 793, provision was made for the *removal of the Delawares from their home on the diminished reservation to lands secured for them in the Indian Territory, and for the sale by the United States of the lands in the reservation whether held in common or assigned in severalty*, with the qualification that assignees electing to dissolve their tribal relations and become citizens of the United States might retain the tracts assigned to them and ultimately receive patents in fee-simple with power of alienation. On receiving payment for the lands sold, the United States was to issue patents therefor to the purchaser or his assigns, and apply the proceeds to the benefit of the tribe or the assignees, depending upon whether the particular lands were

held in common or had been assigned in severalty. The intended removal was effected, the reservation was extinguished, and the lands therein, including most of those assigned in severalty, were sold as intended.

"*The lands through which the asserted right of way here in controversy extends were within the diminished reservation at the date of the Act of* 1862, *had then been assigned in severalty to individual Delawares under the treaty of* 1860, were sold by the United States under the treaty of 1866, and are now claimed by the appellants through mesne conveyances under the patents issued to the purchaser at that sale. The railroad was located and constructed across these lands without the payment of any compensation for the right of way. But, so far as appears, no attempt was made by the tribe, the individual assignees, or the United States to prevent the location and construction, and no controversy arose between them and the railroad company, save as there was a dispute as to whether the assignees were entitled to compensation, and, if so, as to who should pay it. See Grinther v. Kansas Pacific Railway Co., 23 Kansas, 642, *Id.* 659; United States v. Union Pacific Railway Co., 168 U. S. 505. In 1892 Congress recognized the right of the assignees to be compensated for the right of way, and made an appropriation to pay them, accompanying it with a direction to the Attorney General to institute proceedings against the railroad company to compel it to reimburse the Government. See 27 Stat. 120, 126, c. 104; United States v. Union Pacific Railway Co., *supra*.

"The Circuit Court and the Circuit Court of Appeals sustained the railroad company's claim to a right of way 400 feet in width, 168 Fed. Rep.

648, and the present owners of the tracts affected prosecute this appeal.

"*It was contended in the courts below, and the contention is repeated here, that the individual Indians to whom the lands were assigned in severalty obtained no better or different right in them than the tribe had in the lands held in common; in other words, that the right was one of possession or occupancy only, the United States remaining the real proprietor and having full power to terminate the Indian right at will. But, without passing upon that contention, we think it may well be assumed for the purposes of this case that the assignees, although not possessing the legal title and not promised a conveyance of it,* had something more than the ordinary right of possession or occupancy of tribal Indians in lands set apart for tribal use. We say this because the right of the assignees, whatever it may have been, was acquired and held under the treaty of 1860, wherein it was agreed that the Leavenworth, Pawnee & Western Railroad Company should have a perpetual right-of-way over any of the lands assigned in severalty, on the payment of a just compensation to those whose lands were crossed by its railroad. *It therefore is not as if Congress had undertaken to grant a right-of-way through these lands without either the assent of the assignees or any provision for compensating them.* As respects these lands, the right-of-way section in the Act of 1862 did not stand alone, but was to be taken in connection with the treaty provision. The two together meant that the right-of-way was granted, not merely by the United States, but with the assent of the Indian assignees, and that the latter were to be justly compensated. The only uncertainty, if any, introduced into the situation arose from the presence in the right-of-way section of the promise on the part of the

United States that it would as rapidly as might be, extinguish the Indian title to all lands required for the right-of-way. This seems to have given rise to a question, whether the United States was to bear the burden of extinguishing the title, as by compensating the Indians therefor, or only to assist in obtaining it, as by conducting negotiations with the Indians in respect of the compensation to be paid to them. But we are not here concerned with that question, because the right under the treaty to have the compensation seasonably ascertained and paid by whomsoever was liable therefor, was not insisted upon. No steps to that end were taken, but, on the contrary, the construction of the railroad was permitted to proceed and the road was completed and put into operation as a public highway at least three years before the lands were sold under the treaty of 1866.

"*But it is said that the right of way section was inapplicable because it was confined to 'public lands', a term used to designate such lands as are subject to sale or other disposal under general laws. No doubt such is its ordinary meaning, but it sometimes is used in a larger and different sense. We think that is the case here, first, because the provision in the same section, that the United States should extinguish as rapidly as might be the Indian title to all lands required for the right-of-way, implies that Indian lands as to which Congress properly could grant a right-of-way were intended to be included*, and, second, because the section was so interpreted by the Executive Department charged with the administration of the act, as also of affairs pertaining to the Indians and public lands, and rights acquired thereunder ought not lightly to be disturbed after the lapse of so many years.

"It results that the sole irregularity in respect

of the acquisition of the right-of-way contemplated by the treaty provision and the statute, taken together, was the failure to make compensation therefor to the Indian assignees when the railroad was constructed or until after the lands had been sold for their benefit to the remote grantor of the appellants. The railroad was in existence and being operated across the land at the time of the sale, as ever since, and therefore there can be no claim that that or any subsequent purchase was made without notice of the right-of-way.

"So, if the appellants be regarded as claiming under the Indian assignees, which is the most favorable view for the appellants, the case still falls within the general rule, that where a railroad company enters upon the land of another and constructs a railroad thereover under a statute entitling it so to do on condition that compensation be made to the owner, and the latter permits the road to be constructed and put into operation without a compliance with that condition, a subsequent vendee of the owner takes the land subject to the burden of the right of way, and the right to exact payment therefor from the railroad company belongs to the owner at the time the company entered and constructed the road: Roberts v. Northern Pacific Railroad Co., 158 U. S. 1, and cases cited.

"At an early stage of the case it appears to have been contended that the appellants acquired title to parts of the right-of way by adverse possession, but as the contention is expressly abandoned in the brief evidently in view of the ruling in Northern Pacific Railroad Co. v. Smith, 171 U. S. 260; Northern Pacific Railway Co. v. Townsend, 190 U. S. 267, and Northern Pacific Railway Co. v. Ely, 197 U. S. 1, it need not be considered.

"We conclude that the decree of the Circuit Court of Appeals was right."

In Choate v. Trapp, 224 U. S. 665 (which is also a very recent and controlling case), Mr. Justice Lamar delivered the opinion of the Court as follows:

"The eight thousand plaintiffs in this case are members of the *Choctaw and Chickasaw tribes*. Each of them holds *a patent to 320 acres of allotted land issued under the terms of the Curtis Act* (June 28, 1898, 30 Stat. 495, 507 c. 517), which contained a provision 'that the land should be non-taxable' for a limited time. Before the expiration of that period the officers of the State of Oklahoma instituted proceedings with a view of assessing and collecting taxes on these lands lying within that State. The plaintiffs' application for an injunction was denied.

"In order to understand the issues presented by the writ of error it is necessary to refer, as briefly as possible, to certain well-known facts, and to material portions of lengthy statutes, under which the *tribal property* of the *Choctaws and Chickasaws was divided in severalty among their members*.

"The Five Civilized Tribes owned immense tracts of land in territory that is now embraced within the limits of the State of Oklahoma. The legal title was in the tribes for the *common use of their members*. But the fact that so extensive an area was held under *a system that did not recognize private property in land*, presented a serious obstacle to the creation of the State which Congress desired to organize for the government and development of that part of the country. And, with a view of removing these difficulties, it provided (March 3, 1893, 27 Stat. 612, 645, c. 209) for the appointment of the *Dawes Commission, author-*

izing it to enter into negotiations with these tribes for the extinguishment of their title, either by cession to the United States or by allotment, in severalty, among their members. As might have been anticipated, the Commission found that *many of the Indians were greatly opposed to any change.* 'Some of them held passionately to their institutions from custom, and others held with equal tenacity because of the advantages and privileges they enjoyed' (20 H. R. Doc., 1903-4, p. 1). After several years of negotiations their opposition was so far overcome that *provisional agreements were made which contemplated most radical changes in the political and property rights of the Indians.*

"On April 23, 1897, the Dawes Commission and the Choctaw and Chickashaw representatives made what is known as the Atoka Agreement. It was incorporated bodily into the Curtis Act of June 28, 1898 (30 Stat. 505), and was modified by the Act of July 1, 1902 (32 Stat. 641, 657 c. 1362).

"These two acts, containing what is known as the Atoka Agreement and the Supplemental Agreement, provided that Indian laws and courts should be at once abolished; that there should be an enrollment of all the members of the tribe; and that the members of the two tribes should become citizens of the United States.

"It was also provided, as appears from extracts copied in the margin, that each *member of the tribe should have allotted to him* his share of the land—all of which 'shall be non taxable while the title remains in the original allottee;' that a part of the land could be sold after one year and all of it sold after five years; that the patents issued to the allottee 'should be framed in conformity with the provisions of the agreement', *and that the acceptance of such patent should be operative as an assent on his part to the allotment of all land of the*

tribes in accordance with the provisions of the agreement, and as a relinquishment of all his interest in other parts of the common property.

"The complaint does not state when the plaintiffs received their patents, but the report of the Dawes Commission for the year ending June 1, 1904 (20 H. R. Doc., 27-42) shows that the enrollment and allotment had so far progressed as to make it fair to assume that most, if not all, of the patents had been issued and that much of the land was alienable, and all of it was non-taxable when, on November 16, 1907, Oklahoma was admitted into the Union. The Constitution of that State provided that all existing rights should continue as if no change in government had taken place, and that property exempt from taxation by virtue of treaties and Federal laws should so remain during the force and effect of such treaties or Federal laws.

"No taxes were assessed against the lands of the plaintiffs for the year 1907, but on May 27, 1908 (35 Stat. 312, c. 199), Congress passed a general act removing restrictions from the sale and encumbrance of land held by Indians of the class to which the plaintiffs belong. Another section provided that lands from which restrictions had been removed should be subject to taxation.

"Thereupon proceedings were instituted by the State of Oklahoma with a view of assessing the plaintiffs' lands for taxes. This they sought to enjoin, but their complaint was dismissed on demurrer. The case was carried to the Supreme Court of the State which held that Oklahoma was not a party to any contract with the Indians; *that the United States, by virtue of its governmental power over the Indians could have substituted title in severalty for ownership in common without plaintiffs' consent* and that, for want of a con-

sideration, the provision that the land should be non-taxable *was not a contract, but a mere gratuity which could be withdrawn at will.* The court thereupon overruled plaintiffs' contention that *they had a vested right of exemption* which prevented the State from taxing the land at this time and dismissed their suit.

"1. There are many cases, some of which are cited in the opinion of the Supreme Court of Oklahoma (Thomas v. Gay, 169 U. S. 264, 271; Lone Wolf v. Hitchcock, 187 U. S. 553, 565), recognizing that the plenary power of Congress over the Indian tribes and tribal property cannot be limited by treaties so as to prevent repeal or amendment by a later statute. The tribes have been regarded as dependent nations, *and treaties with them have been looked upon not as contracts*, but as *public laws* which could be abrogated at the will of the United States.

"This sovereign and plenary power was exercised and retained in all the dealings and legislation under which the lands of the Choctaws and Chicka-haws were *divided in severalty among the members of the tribes.* For, although the *Atoka Agreement* is in the *form of a contract it is still an integral part of the Curtis Act* and, if not a treaty, is a public law relating to tribal property, and as such was amendable and repealable at the will of Congress. *BUT THERE IS A BROAD DISTINCTION BETWEEN TRIBAL PROPERTY AND PRIVATE PROPERTY, AND BETWEEN THE POWER TO ABROGATE A STATUTE AND THE AUTHORITY TO DESTROY RIGHTS ACQUIRED UNDER SUCH LAW.* Reichert v. Felps, 6 Wall. 160. The question in this case, therefore, is not whether the plaintiffs were parties to the Atoka Agreement, but whether they had not *acquired rights under the*

Curtis Act which are now protected by the Constitution of the United States.

"2. *The individual Indian had no title or enforcible right in the tribal property.* But as one of those *entitled to occupy* the land he did have an *equitable interest which Congress recognized and which it desired to have satisfied and extinguished. The Curtis Act was framed with a view of having every such claim satisfactorily settled.* And though it provided for a *division of the land in severalty, it offered a patent of non-taxable land only to those who would relinquish their claim in the other property of the tribe formerly held for their common use.* For, the Atoka Agreement, after declaring that 'all land allotted should be non-taxable', stipulated further that each enrolled member of the tribes should receive a patent framed in conformity with the agreement, and that *each Choctaw and Chickasaw who accepted such patent should be held thereby to assent to the terms of this agreement and to relinquish all of his rights in the property formerly held in common.*

"*There was here, then, an offer of non-taxable land. Acceptance by the party to whom the offer was made, with the consequent relinquishment of all claim to other lands furnished a part of the consideration, if, indeed, any was needed in such a case, to support either the grant or the exemption.* Wisconsin &c. R. R. v. Powers, 191 U. S. 379, 386; Home v. Rourke, 8 Wall. 430, 437; Tomlinson v. Jessup, 15 Wall. 454, 458. *Upon delivery of the patent the agreement was executed and the Indian was thereby vested with all the right conveyed by the patent and, like a grantee in a deed poll, or a person accepting the benefit of a conveyance,* bound by its terms, although it was not actually signed by him. Keller v. Ashford, 133 U. S. 610, 621; Hendrick v. Lindsay, 93 U. S. 143.

"As the plaintiffs were offered the allotments on the conditions proposed; as they accepted the terms and, in the relinquishment of their claim, furnished a consideration which was sufficient to entitle them to enforce whatever rights were conferred, we are brought to a consideration of the question as to what those rights were.

"3. On the part of the State it is argued that there was, in fact, no tax exemption, but that that provision was only intended to guard absolutely against alienation of the land, whether for taxes, or at judicial sale, or by private contract. In other words, it is said that the tax exemption was only an additional prohibition against a sale, so that when the restrictions against alienation were removed by the Act of 1908 (35 Stat. 312), the provision as to non-taxability went as a necessary part thereof.

"But the exemption and non-alienability were two separate and distinct subjects. One conferred a right and the other imposed a limitation. The defendant's argument also ignored the fact that, in this case, though the land could be sold after five years it might remain non-taxable for sixteen years longer, if the Indian retained title during that length of time. Restrictions on alienation were removed by lapse of time. He could sell part after one year, a part after three years, and all except homestead after five years. The period of exemption was not coincident with this five-year limitation. On the contrary the privilege of non-taxability might last for twenty-one years, thus recognizing that the two subjects related to different periods and that neither was dependent on the other. The right to remove the restriction was in pursuance of the power under which Congress could legislate as to the status of the ward and lengthen or shorten the period of disability. But

the provision that the land should be non-taxable was a property right, which Congress undoubtedly had the power to grant. That right fully vested in the Indians and was binding upon Oklahoma. Kansas Indians, 5 Wall. 737, 756; United States v. Rickert, 188 U. S. 432.

"4. The record contains no copy of any of the patents under which the plaintiffs hold. But the act provided that they should be framed in conformity with the Atoka Agreement. Those who signed the patent could not convey more rights than were granted by that part of the Curtis Act, nor could they, by omission, deprive the patentee of any exemption to which he was thereby entitled. The patent and the legislation of Congress must be construed together, and when so construed, they show that Congress, *in consideration of the Indians' relinquishment of all claim to the common property, and for other satisfactory reasons, made a grant of land* which should be non taxable for a limited period. The patent issued in pursuance of those statutes gave the Indian as good a title to the exemption as it did to the land itself. *Under the provisions of the Fifth Amendment there was no more power to deprive him of the exemption than of any other right in the property. NO STATUTE WOULD HAVE BEEN VALID WHICH REDUCED HIS FEE TO A LIFE ESTATE, OR ATTEMPTED TO TAKE FROM HIM TEN ACRES, OR FIFTY ACRES*, or the timber growing on the land. *After he accepted the patent the Indian could not be heard, either at law or in equity, to assert any claim to the common property. If he is bound, so is the tribe and the Government when the patent was issued.*

"5. It is conceded that no right which was actually conferred on the Indians can be arbitrarily abrogated by statute. But as it is claimed that he,

in fact, acquired no valid exemption, since it stands on a different footing from the grant of the land itself; and that, though the provision of non-taxability added to the value of the property, it can be withdrawn because, if not a gratuity, it is at least subject to the general rule that tax exemptions are to be strictly construed and are subject to repeal unless the contrary clearly appears. Welch v. Cook, 97 U. S. 541; Christ Church v. Philadelphia, 24 How. 300; Wisconsin, Etc., R. R. v. Powers, 191 U. S. 379; Tucker v. Ferguson, 22 Wall. 527; West Wisconsin Ry. v. Board of Supervisors, 93 U. S. 595, are cited in support of this proposition. Some of these cases construe general statutes containing, not a grant, but an offer of exemption to such companies as should do certain work or build certain lines of road before a given date. They hold that a statute making such an offer might be repealed even as against those companies which actually built in reliance on its terms. *But these rulings are based on the theory that 'the Legislature was not making promises*, but framing a scheme of public revenue and public improvement' (Wisconsin, Etc., v. Powers, 191 U. S. 387). *The companies gave nothing and the State received nothing in exchange for the offer. There was no consideration moving from one to the other.* Such exemption was a mere bounty, valuable as long as the State chose to concede it, but as tax exemptions are strictly construed, it could be withdrawn at any time the State saw fit.

"6. But in the Government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its pro-

tection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years and has been applied in tax cases.

"For example, in Kansas Indians, 5 Wall. 737, 760, the question was whether a statute prohibiting levy and sale of Indian lands prevented a sale for State taxes. The rule of strict construction would have compelled a holding that the property was liable. But Mr. Justice Davis, in speaking for the Court, said that 'enlarged rules of construction are adopted in reference to Indian treaties.' He quoted from Chief Justice Marshall, who said that 'the language used in treaties with the Indians shall never be construed to their prejudice, if words be made use of susceptible of a more extended meaning * * *.' Again, in Jones v. Meehan, 175 U. S. 1, it was held that 'Indian treaties must be construed, not according to the technical meaning of their words, but in the sense in which they would naturally be understood by the Indians.' In view of the universality of this rule, Congress is conclusively presumed to have intended that the legislation under which these allotments were made to the Indians should be liberally construed in their favor in determining the rights granted to the Choctaws and Chickasaws.

"The provision that 'all lands shall be non-taxable' naturally indicates that the exemption is attached to the land—only an artificial rule can make it a personal privilege. But if there is any conflict between the natural meaning and the technical construction—if there were room for doubt, or if there were any question as to whether this was a personal privilege and repealable, or an incident attached to the land itself for a limited period, that

doubt, under this rule, must be resolved in favor of the patentee.

"The decision in New Jersey v. Wilson, 7 Cranch. 164, is directly in point here, and especially as to the quality of the exemption. It appeared there that the Delaware Indians had claims to land in that State lying south of the River Rariton. An agreement for a release of the claim was made between the Commissioners and the Indians, under which the latter were to receive a conveyance to a large body of land in fee. The agreement was approved by the State by an act which, among other things, declared that the land 'should not hereafter be subject to any tax.' The Indians, after many years, sold the land, and the State subsequently passed a statute repealing the exemption. This Court, speaking by Chief Justice Marshall, held that 'every requisite to the formation of a contract is found in the proceedings between the then colony of New Jersey and the Indians. The subject was a purchase on the part of the Government of extensive claims of the Indians, the extinguishment of which would quiet the title to a large portion of the province. A proposition to this effect was made, the terms stipulated, the consideration agreed upon, which is a tract of land with the privilege of exemption from taxation; and then, in consideration of the arrangement previously made, one of which this Act of Assembly is stated to be, the Indians executed their deed of cession. This is certainly a contract clothed with forms of unusual solemnity. The privilege, though for the benefit of the Indians, is annexed by the terms which create it, to the land itself, not to their persons.' And it was thereupon held that the right was not affected by the later statute repealing the exemption. The case here is much stronger. For the tax exemption, which adds

value to the property, is not perpetual, but is attached to the land only so long as the Indian retains the title, and in no event to exceed twenty-one years. It is property, and entitled to protection as such, unless the fact that the owner is an Indian subject to restrictions as to alienation made a difference.

"7. There have been comparatively few cases which discuss the legislative power over private property held by the Indians. But those few all recognize that he is not excepted from the protection guaranteed by the Constitution. His private rights are secured and enforced to the same extent and in the same way as other residents or citizens of the United States. *In re* Huff, 197 U. S. 488, 504; Cherokee Nation v. Hitchcock, 187 U. S. 294, 309; Smith v. Godell, 20 Johns (N. Y.) 188; Lowry v. Weaver, 4 McLean 82; Whirlwind v. Von der Ahe, 67 Mo. App. 628; Taylor v. Drew, 21 Ark. 485, 487. His right of private property is not subject to impairment by legislative action even while he is, as a member of a tribe and subject to the guardianship of the United States as to his political and personal status. This was clearly recognized in the leading case of Jones v. Meehan, 175 U. S. 1. There it appeared that an Indian chief owned in fee, land which fronted on a stream: The chief died, and in 1891 his son and heir, during the continuance of the tribal organization, let the land to Meehan for ten years. In 1894 he again let the same property to Jones for twenty years. In that year the Secretary of the Interior was authorized by Congress to approve the lease to Jones if the latter would increase the rental. This he did, and with the assent of the Indian and the Secretary of the Interior a lease was made to Jones. In the litigation which followed Meehan relied on the first contract made in the exercise of

the Indian's right of private ownership. Jones relied on that made under congressional authority, and although the Indian was a member of the tribe and much more subject to legislative power than these plaintiffs, the Court held that the subsequent act could not relate back so as to interfere with the right of property which the Indian possessed and conveyed as an owner in fee, and while Congress had power to make treaties, it could not affect titles already granted by the treaty itself.

"Nothing that was said in Tiger v. Western Investment Co., 221 U. S. 286, is opposed to the same conclusion here. For that case did not involve property rights, but related solely to the power of Congress, to extend the period of the Indian's disability. The statute did not attempt to take his land or any right, member or appurtenance thereunto belonging. It left that as it was. But, having regard to the Indian's inexperience, and desiring to protect him against himself and those who might take advantage of his incapacity, Congress extended the time during which he could not sell. On that subject, after calling attention to the fact that 'Tiger was still a ward of the nation, so far as the alienation of these lands was concerned, and a member of the existing Creek Nation', it was said that 'incompetent persons, though citizens, may not have the full right to control their property', and that there was nothing in citizenship incompatible with guardianship, or with restricting sales by Indians deemed by Congress incapable of managing their estates.

"But there was no intimation that the power of wardship conferred authority on Congress *to lessen any of the rights of property which had been vested in the individual Indian by prior laws or contracts. Such rights are protected from repeal by the provisions of the Fifth Amendment.*

"The Constitution of the State of Oklahoma itself expressly recognizes that the exemption here granted must be protected until it is lawfully destroyed. We have seen that it was a vested property right which could not be abrogated by statute. The decree refusing to enjoin the assessment of taxes on the exempt lands of plaintiffs must therefore be reversed, and the case remanded for further proceedings not inconsistent with this opinion."

In the case of Veale v. Maynes, 23 Kas. Rep. 1, the Court said by Judge Brewer (afterwards a Justice of this Court):

"This is an action in the nature of ejectment, brought by the defendant in error against the plaintiffs in error, *to recover possession of a tract of land which she claims by virtue of an allotment to her under the Pottawatomie treaty of* 1861, 12 *Stat. L.* 1191. *The plaintiffs claim under the patentee, Anthony F. Navarre*, who, as head of the family of which defendant in error was a member, *received the patent for the land in controversy as provided by section 6 of the treaty of* 1867, 15 *Stat. L.* 536. The case was tried by the Court without a jury, and the findings of law and fact are embodied in the record. The certificate of allotment for the land in question, issued to the defendant in error, and the patent to Anthony F. Navarre as head of the family, are both recited in full in the findings of fact. The conclusions of law were as follows:

"'(1) That the said treaty of Nov. 15, 1861, and the action had thereunder, including the issuance of the said certificate by the Commissioner of Indian Affairs, operated as and constituted a grant of the land in controversy to said Susan Letranch (now Susan Maynes, plaintiff); to which

conclusion of law the said defendants then and there excepted. (2) That the said treaty of February, 1867, did not authorize the issuance of the patent to said Anthony F. Navarre; to which conclusion of law the said defendants then and there excepted. (3) That said patent, so issued on the 16th day of May, 1870, to said Anthony F. Navarre, is null and void; to which conclusion of law the said defendants then and there excepted. (4) That the said plaintiff, at the time of the commencement of this action, was and now is the owner of said land and premises in her petition described, and entitled to the immediate and exclusive possession thereof; to which conclusion of law the defendants then and there excepted.'

"*The defendants, being in possession and holding under a patent* from the United States, were entitled to *judgment unless a better title in the plaintiff was shown;* and that better title of necessity implied, not simply an irregularity in the issue of the patent—for that would be a matter between the Government and the patentee—*but a want of title in the Government, or, at least of a right to convey at the time it issued the patent. In other words, it implied the invalidity of the patent because of a prior vesting of either the legal or equitable title in the plaintiff.* To determine this question, it becomes necessary to examine the treaties between the Government and the Pottawatomie Indians of 1846, 1861 and 1867. By them must be determined the extent of the *interest vested in the allottee*, and the power by treaty between the Indians and the Government, to thereafter locate the legal title to the tract covered by the allotment. We quote the various sections which are claimed by counsel to affect this question premising the quotations by saying that certain rules of construction seem to have become settled

concerning Indian treaties and titles, and that the language of the various sections must be construed in the light of these established rules. The treaty of 1846 (9 St. U. S. 853), provided for concentrating the various bands of the Pottawatomie Indians into one nation, to be known as the Pottawatomie Nation, their cession of all lands owned or claimed by them, in consideration of $850,000, to be used or invested as further specified in the treaty. Section 4 then reads:

"'*The United States agree to grant to the said united tribes of Indians possession and title* to a tract or parcel of land containing * * * *and to guaranty the full and complete possession* of the same to the Pottawatomie Nation, parties to this treaty, *as their land and home forever;* for which they are to pay the United States the sum of $87,000, to be deducted from the gross sum promised to them in the third article of this treaty.'

"No other provisions of this treaty seem to throw any light on the question. The treaty of 1861, proclaimed April 19, 1862 (12 St. U. S. 1191), is the next in order, and contains these sections:

"'Article 1. The Pottawatomie tribe of Indians, believing that it *will contribute to the civilization of their people to dispose of a* portion of their present reservation in Kansas, consisting of five hundred and seventy-six thousand acres, which was acquired by them for the sum of $87,000, by the fourth article of the treaty between the United States and the said Pottawatomies, proclaimed by the President of the United States on the twenty-third day of July, 1846, *and to allot lands in severalty to those of said tribe who have adopted the customs of the whites, and desire to have separate tracts assigned to them, and to assign a portion of said reserve to those of the tribe who prefer to hold their lands in common*—it is therefore agreed by

the parties hereto that the Commissioner of Indian Affairs shall cause the whole of said reservation to be surveyed in the same manner as the public lands are surveyed, the expense whereof shall be paid out of the sales of lands hereinafter provided for, and the quantity of land hereinafter provided to *be set apart to those of the tribe who desire to take their lands in severalty*, and the quantity hereinafter provided to *be set apart for the rest of the tribe in common;* and the remainder of the land, after especial reservations hereinafter provided for shall have been made, to be sold for the benefit of said tribe.

"'ART. 2. It shall be the duty of the agent of the United States for said tribe to take an accurate census of all members of the tribe, and to classify them in separate lists, showing the names, ages, and numbers of those *desiring land in severalty*, and of those *desiring lands in common*, designating chiefs and head men, respectively, each adult choosing for himself or herself, and each head of a family for the minor children of such family, and the agent for orphans and persons of an unsound mind. *And thereupon there shall be assigned*, under the direction of the Commissioner of Indian Affairs, to each chief at the signing of the treaty, one section; to each head man one-half section; to each other head of a family, one quarter section; and to each other person, eighty acres of land; to include in every case, as far as practicable, to each family, their improvements and a reasonable portion of timber, to be selected according to the legal subdivision of survey. *When such assignment shall have been completed, certificates* shall be issued by the Commissioner of Indian Affairs for the tracts *assigned in severalty*, specifying the names of the individuals to whom they have been *assigned respectively*, and that said tracts are

set apart for the perpetual and exclusive use and benefit of such assignees and their heirs. Until otherwise provided by law, such tracts shall be exempt from levy, taxation, or sale, and shall be alienable in fee, or leased, or otherwise disposed of only to the United States, or to persons then being members of the Pottawatomie tribe, and of Indian blood, with the permission of the President, and under such regulations as the Secretary of the Interior shall provide, except as may be hereinafter provided. *And, on receipt of such certificates, the person to whom they are issued shall be deemed to have relinquished all right to any portion of the lands assigned to others in severalty, or to a portion of the tribe in common, and to the proceeds of sale of the same whensoever made.*

* * * * * * *

"'Art. 4. To those members of said tribe who *desire to hold their lands in common*, there shall *be set apart* an undivided quantity, sufficient to allow one section to each chief, one half section to each head-man, and one hundred and sixty acres to each other head of a family; and eighty acres of land to each other person; and said land shall be held by that portion of the tribe for whom it is set apart, by the same tenure as the whole reserve has been held by all of said tribe under the treaty of 1846. *And upon such land being assigned in common*, the persons to whom it is assigned shall be held to have relinquished all title to the lands assigned in severalty, and in the proceeds of sales thereof whenever made.'

"The treaty of 1867, proclaimed August 7, 1868 (15 St. U. S. 531), provides for securing a home for the Pottawatomies in the Indian country, and the removal thither of such as desire to be removed. The first, second, and third sections relate to the selection, payment, etc., of the new reserva-

tion. The fourth, sixth and eighth sections, so far as they bear upon the question, are as follows:

"'Sec. 4. A register shall be made under the direction of the agent and the business committee of the tribe, within two years after the ratification of this treaty, which shall show the names of all members of the tribe who declare their desire to remove to the new reservation, and of all who desire to remain and become citizens of the United States; and after the filing of such register in the office of the Commissioner of Indian Affairs, all existing restrictions shall be removed from the sale and alienation of lands by adults who shall have declared their intention to remove to the new reservation; but provided, that no person shall be allowed to receive to his own use the avails of the sale of his land, unless he shall have received the certificate of the agent and business committee that he is fully competent to manage his own affairs; nor shall any person also be allowed to sell and receive the proceeds of the sale of the lands belonging to his family, unless the certificate of the agent and business committee shall declare him competent to take the charge of their property; but such persons may negotiate for the sales of their property and that of their families; and any contracts for sales so made, if certified by the agent and business committee to be at reasonable rates, shall be confirmed by the Secretary of the Interior, and patents shall issue to the purchaser upon full payment, and all payments for such land shall be made to the agent', etc.

"'Sec. 6. The provisions of article 3 of the treaty of April 19, 1862, relative to Pottawatomies who desire to become citizens, shall continue in force with the additional provision that, before patents shall issue and full payments be made to such persons, a certificate shall be necessary from

the agent and business committee that the applicant is competent to manage his own affairs; and when computation is made to ascertain the amount of the funds to the tribe to which such applicants are entitled, the amounts invested in the new reservation provided for in the treaty shall not be taken into account. When any member of the tribe shall become a citizen, under the provisions of said treaty of 1862, the families of said parties shall also be considered as citizens, and the head of the family shall be entitled to patents and the proportional share of funds belonging to his family; and women who are also heads of families, and single women of adult age, may become citizens in the same manner as males.'

"'Sec. 8 (as amended). Where allottees under the treaty of 1861 shall have died, or shall hereafter decease, such allottees shall be regarded, for the purpose of a careful and just settlement of their estates, as citizens of the United States and of the State of Kansas; and it shall be competent for the proper courts to take charge of the settlement of their estates, under all the forms and in accordance with the laws of the State, as in the case of other citizens deceased. And in cases where there are children of allottees left orphans, guardians for such orphans may be appointed by the Probate Court of the county in which such orphans may reside; and such guardians shall give bonds, to be approved by the said Court, for the proper care of the person and estate of such orphans, as provided by law.'

"*The starting point is, of course, the treaty of* 1846. *By that the first cession of this land was made to the Pottawatomies, and it is claimed that by it something more than the ordinary Indian title was granted to the nation. Stress is laid upon the words 'possession and title', and the use*

of the latter, it is said, implies something more than the mere right of occupancy, for that would pass under the former word. It may be that those words in the language of a grant to a corporation or citizen would imply the grant of the title of the grantor. A contract between individuals to convey title might mean full title. But these words in the treaty must be construed in the light of the recognized relations between the Government and the Indians, and the established policy of the former towards the latter. Title does not necessarily mean title in fee-simple; it may mean any kind of title, even the mere title by occupancy. The Indian title has been constantly recognized as simply this inferior title. The Government has uniformly asserted its holding of the fee, and has recognized the Indian right as only one of possession. The Supreme Court reports are full of this doctrine.

"In Doe v. Wilson, 23 How. 463, the Court uses this language:

" 'The United States hold the ultimate title, charged with the right of undisturbed occupancy, and perpetual possession in the Indian nation, with the exclusive power in the Government of acquiring that right.'

"See, also, Johnson v. McIntosh, 8 Wheat. 603.

"As recently as 1877, the Supreme Court, in the case of Beecher v. Wetherby, 95 U. S. 525, has reasserted the doctrine that the Indian right to land is a mere possessory one, and yet the land in question was described as 'owned and occupied by the Menominee Indians', and it was 'set apart' for their future home. So, in the case of U. S. v. Cook, 19 Wall. 591, the Chief Justice, delivering the opinion of the Court said:

" 'The right of the Indians in the land from which the logs were taken, was that of occupancy alone. They had no power of alienation, except

to the United States. The fee was in the United States, subject only to this right of occupancy. This is the title by which other Indians hold their lands. The right of the Indians to their occupancy is as sacred as that of the United States to their fee; but it is only a right of occupancy.'

"Take the Osage Reservation, which was set apart for that tribe by most solemn words of perpetual ownership. The Supreme Court said, in Leavenworth, L. & G. R. Co. v. U. S., 92 U. S. 733, *'that, in the free exercise of their choice, they might hold it forever'; but they could only HOLD it.* The fee was in the United States, subject to the right of the Indians. *Now, that the Government had power to depart from this traditionary policy, and vest the fee, as well as the right of occupancy, in the Indians, is unquestioned; but if a departure had been intended; words more apt and clear would undoubtedly have been used.* There is nothing in the balance of the treaty to distinguish it from ordinary Indian treaties. The tribal existence was fully recognized. No provision was in it for changing the relations of the tribe to the Government, or for naturalizing the individual Indian. There is no restriction on the power of alienation, and no reservation to the Government of the sole or prior right of purchase. *So that, if the fee passed, the tribe could the next day have conveyed full title to an individual, or to any other purchaser, even a foreign nation.* More than that, the further language of the section indicates the extent of the intended grant. It is 'to guaranty the full and complete possession * * * as their land and home forever.' But if the fee was granted, the courts would always protect the title. Possession was guaranteed to the Indians, and not to them and their grantee. In short, there is nothing in or about the treaty to indicate that any other right

or title was granted than that 'by which other Indians hold their land', and that is the right or title of occupancy.

"With this understanding then, of the import of this treaty, we pass on to consider the subsequent treaties. *Chronologically, the treaty of* 1861 *next demands attention. This treaty is a decided advance.* It was a movement towards the disintegration of the tribe, and the absorption of the individual Indians into the body of American citizens. No universal or *abrupt change was contemplated;* and such limitations and checks were placed as it was thought would sufficiently protect these wards of the nation from the schemes of the designing. In carrying out this obvious purpose, three steps were prescribed. The division of property; the conveyance of title; and the naturalization of the person. When these were accomplished, the individual passed out from tribal control, and became an American citizen, with separate and absolute property. Yet, by the terms of the treaty (article 3) all this was possible only for the adult male heads of families. All others, *or necessitate,* remained within the tribe bound by its laws and concluded by its treaties, notwithstanding a certain holding of land in severalty was possible for any and all. The treaty provided for a survey of all the lands and a census of the entire tribe, and then that certain quantities of land be assigned in severalty to those who desire thus to hold, and in common to the remainder. *Now, what was intended by this division—that the title be thus divided up, or the mere matter of occupancy? Of course, either was within the power of the contracting parties. They might provide for a division among the several Indians, which should vest an absolute title in each, beyond the power of the tribe or the Government to disturb, without the*

personal consent of the individual; or they might provide for an individualizing of the right of occupancy, giving to each person a sole right of occupancy in a particular tract, a right guaranteed against invasion by any individual, but still within the power of the tribe, as a tribe, to convey by treaty. In other words, while that remained the tribal home, each individual desiring it should have separate control of certain lands, yet subject to the ultimate power of the tribe to change their home and to make absolute conveyance of the whole body of lands. The power of the tribe as a tribe, remained undisturbed over both the allotted lands and those held in common. That this was the intent and effect of the treaty, we are constrained to hold; and this notwithstanding many expressions which, if used in ordinary contracts between individuals, would have marked significance to the contrary.

"The allottee remained a member of the tribe. We are not advised by anything in the record as to the extent of the power of the tribe over the individual; but whatever that power was, it remained in full vigor over the allottee. There was no separation of the allottee from the nation, and no express restriction upon the power of the tribal authorities to act for him as fully as for any other member of the tribe. And that which thereafter the tribal authorities assumed to do for him, may well be assumed, in the absence of proof of limitations upon their power, to be within the scope of that power as recognized by the laws and customs of the nation. It must be remembered that, in a large sense, an Indian tribe is to be considered as a foreign nation, and its laws and customs matter of proof, and not to be judicially taken notice of. The powers of the supreme authority differ in different nations; and an act of such supreme au-

thority of a foreign nation should not be presumed to be beyond its powers, simply because such an act would be beyond the powers of the supreme authority of our own nation. The full force of this argument will become more apparent when we consider the subsequent treaty of 1867. *At present it is enough to notice that the allottee remained a member of the tribe; and if the intention had been to enlarge his title from the ordinary Indian title—one of occupancy—to that of a fee-simple, the intention would, it seems, have been expressed in unmistakable terms. If, on the other hand, a difference was to be made in the mere manner in which the various Indians occupied the tribal home, it was enough that that difference was made clear, and language used to indicate that should not be carried to some further meaning.*

"If it be said that the allotted tracts were set apart for the perpetual and exclusive use and benefit of the several allottees, and that each allottee relinquished all interest in other allotments as well as in the lands held in common, we reply that these words are no stronger than those which have frequently been used to vest title in an Indian tribe; no stronger than those used in the treaty of 1846, with this same tribe, which we have heretofore noticed. So far as the exclusive benefit is concerned, it was the proffer of an inducement to the allottee to improve his land, in the hope that this incentive would tend towards habits of industry, and, consequently, civilization. To perfect the guaranty of exclusive benefit, exclusive possession while tribal occupancy remained, and receipt of full proceeds of the sale of the separate tract when it was sold, were sufficient.' To them no title need be added, or, at least, none greater than the ordinary Indian title of exclusive occupancy.

"Again, the treaty provided in the third article

for the conveyance of title. This was made only to those who left the tribe and became citizens. Upon their naturalization, a title in fee-simple with power of alienation, was conveyed; and at the same time their proportion of the personal property of the tribe was transferred. At this time appears the complete separation and individualization. Prior thereto their interest in the lands and personalty was tribal; thenceforward personal. The fact that this provision here appears, tends to support the claim that before this nothing was intended save a separate occupancy, with the benefit of all improvements personally made. We might notice other matters in the treaty tending in the same direction; but the foregoing are sufficient. *This same question has recently been before Judge Foster, of the United States Court*, and his opinion, concurred in by *Judge Dillon*, very clearly and forcibly expresses the same conclusion. We quote his language:

"*It has been uniformly held by the Supreme Court that the Indian title was but a right of occupation, the fee remaining in the United States* (U. S. v. Cook, 19 Wall. 592; Johnson v. McIntosh, 8 Wheat. 574; Worcester v. Georgia, 6 Pet. 580; Cherokee Nation v. Georgia, 5 Pet. 48; Fletcher v. Peck, 6 Cranch. 142; 1 Kent Comm. 259); and unless there is a clear and explicit provision in the treaty, showing that the Government intended to make a grant in fee simple, *the Court will not presume a new departure has been made or that a different policy from that pursued in the past was intended. Now, there is but little in this treaty to justify the Court in finding a grant made, or intended to be made, to the allottees.* It was undoubtedly the desire of the Government to induce the Indians to adopt the modes and habits of civilized life whenever it could be accomplished, and,

as a step in that direction, *the plan of allotment in severalty* to those of the tribe who had adopted the customs of the whites, and were willing to abandon all claims to the common lands and funds, was adopted. It was optional with the adult Indian to have his land in common with the tribe, or to have it allotted to him in severalty; the head of the family choosing for the minor children, and the agent for orphans and those of unsound mind. It further provides that certificates shall issue to the allottees for the tracts assigned in severalty, specifying the individuals to whom they had been assigned respectively, and that said tracts are set apart for the perpetual and exclusive use and benefit of said assignees and their heirs. The allotted lands were exempt from taxation and sale and were not alienable by the allottee. That the contracting parties to this treaty did not regard the fee as becoming vested in the allottee by virtue of article 2, and the certificate issued in pursuance thereof, is demonstrated by the next article; for it is therein provided how the adult allottee may obtain that title. It provides, in substance, that when he should make it appear to the United States District Court that he had adopted the habits of civilized life, and that he was sufficiently intelligent and prudent to control his own affairs, and take the oath of allegiance, etc., he could then apply to the President of the United States for a patent, and the President, on being satisfied that he was competent to control his own affairs, might cause the lands to be *conveyed to him by patent in fee-simple, with power of alienation;* and when the patent was made and the fund distributed, the patentee became a citizen of the United States and ceased to be a member of the tribe, and the lands were subject to taxation, sale, etc. That the contracting parties anticipated these allotments would ultimately

ripen into perfect titles through the proceeding specified in article 2, is altogether probable. But that event might or might not happen.'

"Passing now to the treaty of 1867, we find that it is between the same contracting parties as that of 1861. Where contracts are entered into between parties, the construction put by the parties themselves in the latter contract upon the provisions of the earlier, is strong evidence of their real scope and effect. Without doubt, as we have seen, there is obscurity in the treaty of 1861. Now within six years the same parties enter into a further treaty concerning the same subject matter. In so far as in this they put any interpretation upon the provisions of that, it is entitled to great weight. *Indeed, except so far as adverse and vested rights are concerned, it might fairly be said to be controlling.* And, first, it may be noticed that the treaty is with the tribe as a tribe, and concerning the allotted lands as well as those held in common. Notwithstanding the treaty of 1861 had specified that the several allottees should be 'deemed to have relinquished all right to any portion of the lands assigned to others in severalty or to a portion of the tribe in common', yet the dealings in 1867 are not separately with each allottee for his tract and with those holding in common for their body of land, but with the tribe as a whole, and for all the lands. The very manner of thus dealing shows that the parties thereto did not understand that the treaty of 1861 placed the allotted lands, any more than the allottees themselves, outside the limits of tribal control. If the legal title, or even a full equitable title, vested by the allotment in the allottee, then, by our laws at least, no divesting of that title save by the personal assent of the allottee was possible, and any contract therefor would have to be made with each allottee per-

sonally. Now, without noticing all the various provisions indicating an assumed tribal control, it is enough to refer to article 7, which authorizes, in certain cases, and after the lapse of five years a peremptory sale and removal to the new reservation. It is true, there is a provision for securing to each allottee the benefits of the sale of his allotment; but this is simply carrying out the intent foreshadowed in the treaty of 1861, and heretofore noticed in this opinion, of encouraging each Indian to the improvement of his separate tract by the assurance that the full benefit of his labor and those improvements should inure to himself. Again, article 6 specifically provides that the 'head of the family shall be entitled to patents and the proportional share of funds belonging to his family.' This is an express provision, and the clearest assertion of the understanding of the parties of the scope and import of their contract in 1861. It is also an assertion of tribal power which, as already suggested, must be assumed to be within such power as recognized by established laws and customs of the tribe. Counsel would have us interpret these words as meaning simply that the head of the family should be entitled to the custody of the patents issued to the allottee members of his family. But this does violence to the language. The mere custody of the evidence of title would scarcely be dignified with a separate provision in the treaty, and if that were in fact intended, words more apt would assuredly have been used. Clearly, the money and the lands which, under the division, would be or had been assigned to the minor members of his family, were to go directly to him. As head of the family, he represented it, and to him the treaty intended should pass whatever was the family share of the tribal property.

"In further support of these views, it may be noticed that the action of the ministerial officers of the government has been in the line of this construction of the treaty, and that, so far as appears, without objection from the tribe. Again, in 1869, an attempt was made by Congress to withhold from the head of the family the minors' share of the tribal funds (16 St. at Large 29), but this act was repealed in 1870 (16 St. at Large 370) as in conflict with the prior treaties. In other words, when the attention of Congress was called to the matter, it recognized the fact that by treaty the head of the family was entitled to such funds. If entitled to the funds, why not also to the lands?

"*Our conclusion, then, is that the treaty of* 1867 *authorized a patent in fee simple to the head of the family of lands prior thereto allotted to the members of his family, and that such provision was not invalidated by any prior treaties or in derogation of any vested rights.*

"The judgment of the District Court will therefore be reversed, and the case remanded, with instructions to render judgment on the findings in favor of plaintiffs in error, defendant below.

"It is understood that the same question controls the case of Taylor v. Wilbers; and the judgment in that case will be affirmed.

"(All the justices concurring.)"

The Court of Claims, in its opinion, expressly held:

"The Indian title was one of occupancy; the fee was in the United States, and the right of conveyance was limited to the United States or to others by their express consent. This rule has prevailed since the first litigation involving the subject and has never been departed from in any case (Johnson v. McIntosh, 8 Wheat. 543; Jones v. Meehan,

175 U. S. 1; United States v. Winans, 198 U. S. 371). While the Indian title was limited to the use and occupation of the lands and they were held in communal ownership, still it was such a title as the United States, in theory at least, fully respected and generally protected in its dealings with the respective tribes. The question of Indian title and Indian rights has been so frequently before the courts that it is needless to multiply citations supporting this contention."

The Cherokee, Creek, Choctaw and Chickasaw Tribes of Indians were not original occupants of any of the lands in the Indian Territory. Each and all of the tribes originally lived east of the Mississippi River. Their title to their lands east of the Mississippi River was only an Indian title, or a right of occupancy, under the decisions cited, *supra*. The history of the removal of these tribes from their original homes east of the Mississippi to the lands in the Indian Territory, shows conclusively a surrender or extinguishment of their right of occupancy to lands east of the Mississippi River in exchange for similar rights of lands in the Indian Territory. By Act of Congress of May 28th, 1830 (4 Stat. 411), it was provided that it should be lawful for the President to exchange any or all of the lands described in the act for the lands of any Indian tribe in any State or Territory. Section 3 of that act provided.

"In the making of any such exchange or exchanges it shall and may be lawful for the President to assure the tribe or nation with which the exchange is made that the United States will forever secure and guarantee to them, and their heirs, or successors, the country so exchanged

with them, and if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same, *provided always, that such lands shall revert to the United States if the Indians become extinct or abandon the same.*"

The patent issued to the Cherokee Nation, dated December 31, 1838, recites that in the execution of the special agreements between the United States and the Cherokee Nation, the United States

> "have given and granted and by these presents do give and grant unto the said Cherokee Nation", two tracts of land, one being the lands in the Indian Territory, containing 13,574,135 acres, and the other a tract of 800,000 acres of land in Kansas.

A copy of this patent is printed in the Appendix, page 419.

It is important to make mention of this here, because of the difference between the title of the Cherokees to the land in Kansas and that in the Indian Territory, as will hereafter appear. The *habendum* clause of the Cherokee patent reads:

> "To have and to hold the same, together with all the rights, privileges and appurtenances thereunto belonging to the said Cherokee Nation forever. * * * And subject also to the condition provided by the Act of Congress of the 28th of May, one thousand eight hundred and thirty, referred to in the above recited third article, and which condition is that the lands hereby granted shall revert to the United States if the said Cherokee Nation becomes extinct or abandons the same."

The stipulations and agreements referred to in the Cherokee patent were those contained in the following

treaties between the Cherokee Indians and the Government, namely, the treaty of May 6th, 1828 (7 Stat. 311), of February 14, 1833 (*Ib.* 414) and December 29, 1835 (*Ib.* 479).

By reference to the treaties of May 6, 1828, and February 14, 1833, certain articles of which are set forth in that patent, it is clear that the Government did not agree to grant the Indian Territory lands to the Cherokee Nation in *fee-simple*. By these two treaties, the United States simply

> "guaranteed and secured, to be conveyed by patent to the Cherokee Nation of Indians"

the lands in question.

In addition to the main body of lands in the Indian Territory the Cherokees had what was known as the "Cherokee Strip", being an outlet from the main body of lands to the west. These treaties as to this strip provided:

> "The United States further guaranty to the Cherokee Nation a perpetual outlet west, and free and unmolested use of all of the country west of the western boundary line of said 7,000,000 acres",

and as to both the main body of land in the Indian Territory and the outlet west, the United States agreed to issue

> "letters patent * * * for the land hereby guaranteed."

It is, therefore, perfectly clear that, as to all of the lands in the Indian Territory, there was no agreement to grant a *fee-simple* title. These provisions as to the Indian Territory lands were followed by a provision

covering 800,000 acres of land in Kansas. As to these Kansas lands, it was provided:

> "And whereas, it is apprehended by the Cherokees that in the above cession there is not contained a sufficient quantity of land for the accommodation of the whole nation, on their removal west of the Mississippi, the United States, in consideration of the sum of five hundred thousand dollars, therefore, *hereby covenant and agree to convey to the said Indians and their descendants, by patent, in fee-simple*, the following *additional tract of lands*."

The difference between the title to the lands in Kansas to be granted to the Cherokees and the title to the lands in the Indian Territory, is therefore manifestly clear. As to the Kansas lands, it was an out and out sale for a money consideration. As to the Indian Territory lands, it was simply an exchange of rights of occupancy to lands east of the Mississippi River for similar rights to lands in the Indian Territory. This is further shown by the treaty with the Cherokees of 1846 (9 Stat. 871), which was entered into after the issuance of the above patent for the purpose of determining certain disputes which had grown up between two divisions of the Cherokee Nation and between those nations and the Government. Article 1 of that treaty reads as follows:

> "That the lands now *occupied* by the Cherokee Nation shall be *secured* to the whole Cherokee people for their common use and benefit; and a patent shall be issued for the same, *including the eight hundred thousand acres purchased*, together with the outlet west promised by the United States, in conformity with the provisions relating thereto, contained in the third article of the treaty

> of 1835, *and in the third section of the Act of Congress, approved May twenty-eighth, eighteen hundred and thirty*, which authorizes the President of the United States, in making exchanges of lands with the Indian tribes, to assure the tribe or nation with which the exchange is made, that the United States will forever secure and guarantee to them, and their heirs or successors, the country so exchanged with them; and if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same: *Provided, always, that such lands shall revert to the United States if the Indians become extinct or abandon the same.*"

This interpretation of the original treaties and the patent is further shown by certain provisions in the Cherokee treaty of 1866, providing for the disposition of a portion of the Cherokee lands lying west of longitude 96, to other Indians (14 Stat. 799). As to the lands so disposed of to other Indians lying west of longitude 96, no deed was required from the Cherokee Nation, but only from the United States to such other Indian tribes, it being provided that as to the lands remaining the property of the Cherokee Nation east of longitude 96, that

> "The Cherokee Nation to *retain the right of possession* of and jurisdiction over all of said country west of 96 degrees longitude until thus sold and occupied, after which their jurisdiction and *right of possession* to terminate forever as to each of said districts thus sold and occupied",

showing conclusively, that as to the lands both east and west of longitude 96, they only had a right of possession, and that they were to retain this right of posses-

sion east of longitude 96, and were to relinquish it as to the lands west thereof, and by Article 26 of the 1866 Cherokee treaty (14 Stat., p. 806), the United States simply agreed to guarantee

> "To the people of the Cherokee Nation the quiet and peaceable pos-session of their country."

By the patent of the Government of August 11, 1852, to the Muskogee or Creek tribe of Indians, the United States, in consideration of the premises and in conformity with treaty provisions

> "Have given and granted and by these presents do give and grant unto the said Muskogee or Creek tribe of Indians, the tract of country above described."

The *habendum* clause reads:

> "To have and to hold the same unto the said tribe of Indians so long as they shall exist as a nation and continue to occupy the country hereby conveyed to them."

A copy of this patent is printed in the appendix, page 427.

This patent was made in conformity with the treaty of February 14, 1833, with the Muskogee or Creek tribe of Indians.

By treaty of March 24, 1832 (7 Stat. 366), between the Government and the Creek tribe, the Creeks ceded to the United States all their land east of the Mississippi River. This treaty provided for the removal of the Creeks to lands west of the Mississippi River. Article 14 of that treaty reads as follows:

> "The Creek country west of the Mississippi shall be solemnly guaranteed to the Creek Indians, nor shall any State or Territory ever have

> a right to pass laws for the government of such Indians, but they shall be allowed to govern themselves, so far as may be compatible with the general jurisdiction which Congress may think proper to exercise over them. And the United States will also defend them from the unjust hostilities of other Indians, and will also as soon as the boundaries of the Creek country west of the Mississippi are ascertained, cause a patent or grant to be executed to the Creek tribe, *agreeably to the third section of the Act of Congress of May* 2 (28), 1830, *entitled 'An act to provide for an exchange of lands with the Indians residing in any of the States or Territories, and for their removal west of the Mississippi.'* "

It is true that by Article 3 of the 1833 treaty with the Creek Nation, the United States agreed to

> "Grant a patent in fee-simple to the Creek Nation of Indians for the land *assigned* said nation",

but, by the same article, it was also expressly provided that the title thus granted

> "shall be continued to said tribe of Indians so long as they shall exist as a nation and continue to occupy the country hereby assigned",

thus reading into this article of the 1833 treaty, the provisions of the Act of May 28th, 1830, and in the patent itself there was as above shown, no grant of the *fee-simple* title.

By the patent of March 23rd, 1842, the United States gave and granted

> "and by these presents do give and grant unto the said Choctaw Nation, the aforesaid 'tract of country west of the Mississippi.' "

The *habendum* clause reads:

> "To have and to hold the same, with all the rights, privileges, immunities and appurtenance of whatsoever nature thereunto belonging as intended 'to be conveyed' by the aforesaid article, 'in fee-simple to them and their descendants, to inure to them while they shall exist as a nation and to live on it'; liable to no transfer or alienation, except to the United States, or with their consent."

A copy of this patent is printed in the appendix, page 430.

By treaty between the United States and the Choctaw Nation of October 18th, 1820 (7 Stat. 210), the Choctaws agreed to move from their lands east of the Mississippi, to lands west of the Mississippi. By Article 2 of that treaty, the United States agreed simply to *cede* to said nation a tract of country west of the Mississippi River, as there described.

By the treaty between the Government and the Choctaw Nation of January 20th, 1825 (7 Stat. 234), the Choctaws receded to the United States a part of the lands covered by the cession to them by the treaty of 1820.

By treaty between the Choctaws and the United States dated Sept. 27th, 1830 (7 Stat. 333), the United States agreed, under a grant specially to be made, to convey to the Choctaw Nation the tract of land therein described

> "in fee-simple to them and their descendants, to inure to them while they shall exist as a nation and live upon it."

While therefore, in this treaty and in the patent the words "fee-simple" are used, they are limited by the retention on the part of the Government of a rever-

sionary estate, in conformity with and practically in the words of the *Act of May* 28th, 1830.

By treaty of October 20th, 1832 (7 Stat. 381), between the Government and the Chickasaw Nation, the Chickasaws agreed to cede to the United States their lands east of the Mississippi River and to remove to the lands west of the Mis-sissippi River.

By treaty dated Jan. 17, 1837 (11 Stat. 573), between the Government and the Choctaw and Chickasaw Nations, it was agreed that the Chickasaws should have the privilege of forming a district within the limits of the Choctaw country in the Indian Territory

> "to be held on the same terms that the Choctaws now hold it",

except the right of disposing of it, which is held in common with the Choctaws and Chicka-saws. This treaty by Article 2 defined what should be known as the Chickasaw district.

By treaty dated June 22, 1855, duly ratified and confirmed by the Choctaw and Chickasaw Nations and by the Government, and proclaimed March 4, 1856 (11 Stat. 611), provision was made for the *relinquishment* of all claim by the Choctaw Nation of any territory west of the 100th degree of west longitude, and for the permanent settlement within the Choctaw country of the Wichita and certain other tribes of Indians, for which purposes the Choctaws and Chickasaws expressed a willingness to lease the lands to the United States. This treaty also recites that certain dissensions and controver-ies had arisen between the Choctaw and Chickasaw tribes, and between them and the United States, and it was therefore provided:

> "The following shall constitute and remain the

boundaries of the Choctaw and Chickasaw country, viz.: Beginning at a point on the Arkansas River, 100 paces east of old Fort Smith, where the western boundary line of the State of Arkansas crosses the said river, and running thence due south to Red River; thence up Red River to the point where the meridian of one hundred degrees west longitude crosses the same; thence north along said meridian to the main Canadian River; thence down said river to its junction with the Arkansas River; thence down said river to the place of beginning.

"*And pursuant to an Act of Congress approved May* 28, 1830, the United States do hereby forever *secure* and *guaranty* the lands embraced within the said limits to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to be held in common; so that each and every member of either tribe shall have an equal undivided interest in the whole: *Provided, however*, no part thereof shall ever be sold without the consent of both tribes; *and that said land shall revert to the United States if said Indians and their heirs become extinct, or abandon the same.*"

The patent issued to the Choctaws on March 23, 1842, and which covered both the Choctaw and Chickasaw districts, must therefore be read in the light of this article of the 1855 treaty.

By Article 9 of this 1855 treaty, the Choctaws *quitclaimed* and *relinquished* to the United States

> "all their right, title and interest in and to all lands west of the 100th degree of west longitude",

and the Choctaws and Chickasaws also leased to the United States that portion of their common territory

west of the 98th degree for the settlement of the Wichita and other bands of Indians, and by Article 10 of that treaty the United States, "in consideration of the foregoing *relinquishment* and lease", agreed to pay the Choctaws the sum of $600,000 and the Chickasaws the sum of $200,000. All of these provisions of the 1855 treaty are entirely inconsistent with any concession on the part of the United States that the Choctaws or Chickasaws acquired a *fee-simple* title by the patent of 1842.

By Act of Congress of July 5, 1862 (12 Stat. L. 528), it was provided that in case the tribal organization of any Indian tribe should be in hostility with the United States, the President was authorized to declare all treaties with such tribe to be abrogated, if, in his opinion, the same could be done with good faith and legal and national obligations. Each and every of the four tribes in question, the Cherokees, Creeks, Choctaws and Chickasaws, on the breaking out of the Civil War, entered into treaties with the Confederate Government.

By Act of Congress of Feb. 22, 1862, 12 U. S. Stat. L. page 614, the Secretary of the Interior was authorized to pay out of annuities payable to the Creeks, Choctaws and Chickasaws, in consequence of the cessation of intercourse with these tribes by reason of their joining the Confederate States, so much of the same as might be necessary for the relief of such portions of said tribes as remained loyal to the United States, and might be or were driven from their homes into the State of Kansas, or elsewhere.

By Act of Congress of July 5, 1862, 12 Stat. L. 528, it is provided that all appropriations theretofore or thereafter made to carry into effect the treaty stipu-

lations or otherwise on behalf of any tribe or tribes of Indians, all or any portion of whom should be in a state of hostility to the Government, including the Cherokees, Creeks, Choctaws and Chickasaws, should be suspended and po-tponed, wholly or in part, at the discretion of the President, and that the President might use the funds of those nations for the relief and support of individual members of said tribes driven from their homes.

The Civil War having ended, a council was held on Sept. 25, 1865, at Fort Smith, Arkansas, which was attended by D. N. Cooley, Commissioner of Indian Affairs, and other commissioners named by the President. There were also in attendance representatives of the Choctaws, Chickasaws, Creeks and Cherokees. In an address by Chairman Cooley to the Indian delegates, he stated that the Commissioners, on behalf of the Government, were instructed by the President to negotiate new treaties with the Indians; that the Cherokees, Creeks, Choctaws and Chickasaws, by making treaties with the enemies of the United States had forfeited all their rights and lands, and the protection of the United States. (*United States v. Choctaw Nation et al.*, 179 U. S. 523.) The address of Chairman Cooley is set forth in full in the opinion in this case, and therein he stated the terms upon which the Government would negotiate new treaties with the tribes.

By the 1866 treaty with the Cherokee Nation, the United States simply guaranteed to that nation

> "the quiet and peaceable possession of their country",

and by the 1866 Creek treaty, the United States simply reaffirmed and reassumed

> "all obligations of treaty stipulations with the Creek Nation, entered into before the treaty of said Creek Nation with the so-called Confederate States",

and by the 1866 treaty with the Choctaw and Chickasaw Nations, the United States simply reaffirmed

> "all obligations arising out of treaty stipulations or acts of legislation with regard to the Choctaw and Chickasaw Nations, entered into prior to the late rebellion and in force at that time, and not inconsistent herewith."

That there was a reversionary estate and interest in the Indian Territory lands in the United States, is conclusively shown by Sec. 15 of the Act of Congress of March 3, 1893, 27 Stat. L. 645, wherein and whereby the United States gave its consent to the allotment of lands, conditional upon the Indians becoming citizens of the United States. This act specifically provides

> "and upon the allotment of the lands held by said tribes respectively, *the reversionary interest of the United States* therein shall be relinquished and shall cease."

This reversionary interest or estate had already been granted to your petitioner. Not only did the United States understand and by this act declare that it had a reversionary interest in the lands, but the Indians so understood it, because they declined to take allotments in severalty except on the United States joining in the patents and granting them the fee-simple title (Petition, R., p. 41). And the Indians insisted upon the Government joining in the patents because of your petitioner's claim (Petition, R., p. 42). In Section 16

of this Act of Congress of March 3, 1893, the President was directed to nominate commissioners to enter into negotiations with the several tribes for allotting the lands and, as a preliminary requisite thereto, to negotiate agreements with them

> "for the purpose of the extinguishment of the national or tribal title to any lands within that territory, now held by any and all of such nations or tribes, *either by cession* of the same or some part thereof to the United States, or by *the allotment* and *division* of the same in severalty among the Indians of such nations or tribes."

And by said section it was further provided that none of its provisions, nor the negotiations nor any agreements with the Indians should be held to in any way waive or impair any right which the Government of the United States had in the lands in the Territory. The agreements, therefore, which were authorized to be negotiated with the Indians were not for the purpose of acquiring from the Indians the fee-simple title (which they never had), but simply for the purpose of extinguishing the tribal title. So, in the grant of lands to your petitioner, it was to be entitled to the possession of the lands, not upon the acquisition by the Government of the *fee-simple* title from the Indians, but simply upon the extinguishment of the *Indian title*. All of these acts and grants are entirely inconsistent with the idea that the Government ever understood that it parted with the *fee-simple* title to the Indians, or that the Indians understood that they had acquired the *fee-simple* title by the treaties and the patents.

In the court below counsel for defendant claimed that a distinction existed between the original Indian title by mere occupancy and the title held by the Chero-

kees, Creeks, Choctaws and Chickasaws, under direct treaties and patents issued pursuant thereto, seemingly contending that in respect of such latter titles they *excluded* any reserved or ultimate title as vested in the United States at the time of the passage of the Acts of July 25th and 26th, 1866, here in question, although that contention stood in direct conflict with previous decisions of this Court. But the contention on that point is settled by the cases cited, *supra*, and finally by the recent decision of this Court in *Fleming v. McCurtain*, 215 U. S. 56. That was a bill in equity by and on behalf of some 13,000 persons, all of Choctaw or Chickasaw Indian blood and descent, and was brought against the Secretary of the Interior, McCurtain, Chief of the Choctaws, and Johnson, Governor of the Chickasaws, and all persons whose names appeared on the rolls of citizens of the Choctaw and Chickasaw nations, as well as all persons whose names appeared upon the freedmen roll. The bill was filed to prevent the allotment of the lands, the claim being made that under the treaties and patents to the Choctaw and Chickasaw Indians the scheme of allotment was invalid, and that the plaintiffs, as members of the tribe, were the owners of the fee to the lands. The opinion was by Mr. Justice Holmes and, *inter alia*, held (page 57):

> "The plaintiffs found their claim upon the Choctaw treaty of Dancing Rabbit Creek, September 27, 1830 (article 2, 7 Stat. 333), and letters patent of March 23, 1842, coupled with a treaty between the Choctaws and Chickasaws of January 17, 1837, ratified by the Senate March 24, 1837 (11 Stat. 573). By Article 2 of the treaty of 1830 'the United States, under a grant specially to be made

by the President of the United States, shall cause to be conveyed to the Choctaw Nation a tract of country west of the Mississippi River, in *fee-simple* to them and their descendants, to inure to them while they shall exist as a nation and live on it', with the boundaries. The letters recite this article, and, 'in execution of the agreement', grant the described tract, to have and to hold the same 'as intended to be conveyed by the aforesaid article "in *fee-simple* to them and their descendants, to inure to them while they shall exist as a nation and live on it", liable to no transfer or alienation except to the United States or with their consent.' The treaty with the Choctaws gave the Chickasaws a district within the limits of the Choctaws' country, 'to be held on the same terms that the Choctaws now hold it, except the *right* of disposing of it, which is held in common with the Choctaws and Chickasaws, to be called the Chickasaw district of the Choctaw Nation.' The plaintiffs say that the patent conveyed the legal title to the Choctaw Nation in trust for such persons as were members of the tribe at the date of the treaty, or of the Chickasaw tribe at the date of the treaty with them, and their respective descendants, and that upon the dissolution of the nation the legal title merged with the equitable title, and the designated class became the absolute owners of the property as tenants in common.

"The plaintiffs, in aid of their view, refer to various indications that the policy of the United States already was looking toward the disintegration of the Indian tribes, point out that the words on which they rely were interlined in the Government draft at the instance of the Indians, and from these and other circumstances argue that their construction is confirmed. They say that the dominant phrase is 'in *fee-simple* to them and

their descendants', and that the use of the plural 'them' shows a transition from the nation as formal grantee to the members as beneficiaries. They say that 'descendants' was used instead of 'heirs' or 'children' to avoid questions of legitimacy, or giving an absolute title to living members and their children, and to establish a principle of devolution suitable to the mode of life and unions in those Indian tribes. They conclude that the words 'inure to them while they shall exist as a nation and live on it' only mark the duration of the legal title and do not cut down the equitable right conferred by the earlier words.

"As we cannot agree with this construction it will be unnecessary to consider many of the further allegations of the bill. The foundation of the plaintiffs' case is upon the words of the treaty and the patent that we have set forth. Those words seem to us to convey a different meaning on their face, a meaning that would not be changed but rather confirmed if we were to refer at length to the earlier and later dealings with the tribes, which we shall not need to do. We should mention, however, that the United States already had ceded this tract to the Choctaw Nation, with no qualifying words, by the treaty of October 18, 1820, Article 2, 7 Stat. 210. *Choctaw Nation v. United States*, 119 U. S. 1, 38. The treaty of 1830 only varied the description a little and provided for a special patent. But it would not better the plaintiffs' case if the treaty of 1830 were the single root of their grant. In a grant to the Choctaw Nation as a nation it was natural, as in other cases, to use some words of perpetuity. Of course, the United States could use what words it saw fit to manifest its purpose, but the habit derived from private conveyances would be likely to prevail, and as in such instruments the gift of a fee is ex-

pressed by adding to the name of the grantee the words 'and his heirs', or in case of a corporation, although unnecessary, its 'successors and assigns', here also some addition was to be expected to the mere name of the grantee. The word nation is used in the treaty as a collective noun, and as such, according to a common usage, is accompanied by a plural verb in the very next article. ('The Choctaw Nation of Indians consent and hereby cede.') Therefore the second article says 'to them' rather than 'to it', just as it says 'while they (*i. e.*, the nation), shall exist as a nation', and it adds to the untechnical 'in *fee-simple*' untechnical words of limitation of a kind that would indicate the intent to confine the grant to the nation, which 'successors' would not, and at the same time to imply nothing as to the rules for inheritance of tribal rights, as 'heirs' might have seemed to do. We may compare 'for the government of the Choctaw Nation of red people and their descendants', in article 4. The word was addressed to the Indian mind.

"There is not a suggestion of any trust in the language to either the technical or the unlearned reader, and it is most unlikely that the United States would have attempted to impose one upon the Choctaws in favor of the existing members of the tribe in the very 'treaty' that dealt with them as a *quasi*-independent nation recognized by article 5 as having the right to make war, and that by the fourth article bound the United States to secure to that nation 'the jurisdiction and government of all the persons and property that may be within their limits west', etc. It is true that in further promising to secure the nation from all laws except those enacted by their own National Councils, the fourth article adds 'not inconsistent with the Constitution, treaties and laws of the

United States'; but this addition is far from suggesting that a constitutional right of property has been conferred upon a designated class, that might be enforced in a Circuit Court of the United States by a bill in equity against what was called a nation. How far any one was from that understanding or from doubting that all the rights granted by the United States were in the Choctaw Nation is shown by the treaty with the Chickasaws upon which the plaintiffs rely. The nation had no right to make that treaty as it did, if it was subject to the trust supposed. Again, the limitation of time 'while they shall exist as a nation and live on it', shows that the grant has reference to the corporate existence of the nation as such, and very plainly qualifies the absoluteness of the earlier words, 'in *fee-simple*.' The suggestion that it limits the duration of the legal title only but leaves a trust outstanding is simply arbitrary. If the plural signifies the members of a class constituted *cestuis que trust* the limitation would attach to the trust. But the only answer necessary is that no such separation or intent can be discovered in the words.

"What we have said shows another sufficient answer to the plaintiff's claim. They say and argue, as they must in order to make out their right to a distribution to themselves, that the Choctaws and Chickasaws no longer exist as nations. But, if so, the grant also was at an end when the nations ceased to be, and it rested with the bounty of the United States to decide what should be done with the land, except so far as it already had been decided by treaties or statutes upon which the plaintiffs do not and cannot rely. It is said that by article 18, in case of any well-founded doubt as to the construction of the treaty, it is to be construed most favorably toward the Choctaws. But

there is no wellfounded doubt, except whether the construction contended for would have been regarded as favorable to the Choctaws, since it would have cut down the autonomy that the treaty so carefully expressed. See further *Stephens v. Cherokee Nation*, 174 U. S. 445, 488; *Cherokee Nation v. Hitchcock*, 187 U. S. 294, 307; *Lone Wolf v. Hitchcock*, 187 U. S. 553, 568."

This is plainly a decision wholly in favor of claimant's contention that—

1st. The Indian right or title was wholly tribal or communal, and

2nd. Could not be altered into individual or segregated title to specific smaller tracts independent of further congressional enactment—precisely what was undertaken to change the holding by the tribe as a *unit* into individual ownership of segregated parcels.

As the treaties with and patents to the Cherokee, Creek, Choctaw and Chickasaw Nations or tribes are precisely alike in legal effect, the decision just cited applies with equal force to all of them.

This case reaffirms the same conclusions expressed by the Circuit Court of Appeals for the Eighth Circuit in *Ligon v. Johnston et al.*, 164 Fed. 670.

It will, of course, be well remembered that these same tribes had surrendered their Indian or occupancy title to the lands occupied by them east of the Mississippi in Georgia and adjoining States. In extinguishing their title to such lands it was entirely proper that the United States should by treaty guarantee the undisturbed possession and use of the lands which they had agreed to take in exchange and to which they had agreed to remove. It is not to be presumed and stands against all precedent and prac-

tice to affirm that with respect to these lands in the Indian Territory and these particular tribes, the United States had in effect transferred a complete *fee-simple* title without retaining the ultimate fee title with consequent power thereover, subject of course to the right of communal or tribal Indian occupancy until extinguished in some lawful manner. No one can now contend that by treaty or patent, or both, the full *fee-simple* title passed to the nation or tribe. That would imply the power of disposal of the fee by the Indian tribes. But the United States has never permitted that to be done without its express consent—a condition wholly incompatible with the holding of the allodial or complete title in fee.

SECOND.

The meaning and effect of the grants of lands, as made by the Acts of July 25th and 26th, 1866.

We have seen that the Indian title, in whatsoever form expresed, and whether resting on original occupancy, later treaty, reservation or patent, is after all but the common tribal or community right of possession. Such character of title has no counterpart in title to realty known to the common law. It is therefore *sui generis*. It arose from actual conditions which antedated and followed the coming of the civilization of the white man. It was ever regarded as inferior to the title of the white successor whose coming pushed the red man westward, for the two races could not exist together on terms of property equality. Such is the history of the country since colonial times. And to safeguard the interest of the Indian against the increasing encroachment of the individual white, the United States has protected the Indian occupancy by

forbidding the white man's individual acquisition of the Indian lands except through Governmental action. That wise policy has protected the Indian against individual greed, but the Anglo-Saxon thirst for land has compelled Governmental action in extinguishment of Indian tribal title by the operation of that irresistible force. Under its resistless pressure civilization has advanced until the frontier of white occupancy has long since ceased to exist. The tides of settlement from the Atlantic on the one side and the Pacific on the other have long intermingled without any barrier caused by the occupancy of the Indians.

The true interpretation of the meaning and effect of these Acts of 1866 cannot be apprehended without accurate knowledge of the then existing conditions. A great civil war had just closed; the experience of that trying time had shown that one great national weakness lay in the fact that the several and distant parts of the Union were not bound together with necessary railroads whereby quick communication for common defense between all parts could be had. The public men of that time saw and realized the imperative need of encouraging the building of such necessary railroad lines. The acts of 1862 and 1864 extended liberal aid by way of grants of land and subsidy bonds for a transcontinental line. There was no communication, however, between the then West and the Southwest country stretching to the Gulf of Mexico. The natural line of route to reach the Gulf from that Western section lay across the Indian Territory. The Act of March 3, 1863 (12 Stat. 772), granting lands to Kansas to aid construction of a railroad east and west across that State, offered like aid also to a branch line extending southeasterly to the common boundary line of Kan-

sas and the Indian Territory, but there it stopped. The company on whom the State of Kansas conferred this grant of lands for the main east and west line and branch line south to the north boundary of the Indian Territory accepted the former grant and proceeded with construction. But it declined the branch line grant and assigned its right to the land grant to another—this appellant company. The latter was authorized to build and receive the branch line grant, but construction halted because the right extended only to the Indian Territory boundary, and between that point and the ultimate terminal for such a system—the Gulf of Mexico—lay the barrier of this Indian occupancy, wherefrom white settlement was rigidly excluded, and which hence offered no advantage sufficient to justify construction. To cover that 250 miles of practical tunnel and offer some present inducement was the plain object of the acts of 1866. To accomplish that desired result Congress by those acts offered to *three* distinct Kansas corporations the grant of lands through the Indian Territory as embodied in those acts and made the company first reaching in actual construction the northern boundary of the Indian Territory the sole and preferred grantee of the land grant made through that Territory. The history of the times; the language of the Act of July 25, 1866, and particularly section eleven thereof, makes the Government's intention and desire transparently clear. If the Government did not desire such through railroad construction to reach the Gulf of Mexico and the Southwest, and for such public purposes, then invasion of the Indian Territory was an unnecessary intrusion upon the Indian tribes domiciled there. It was and could only have been the pressure of Government need and corresponding de-

sire which prompted or justified the passage of the acts of 1866. Certainly the Indians did not need a railroad, and there was no white man's occupancy to justify construction. To obtain private capital for such an enterprise was plainly impossible without the grant of future Government aid. Viewing the situation as it then existed, it is perfectly clear that the Government's interest in securing this railroad construction was predominant and primary in every sense. As averred in the petition herein it was the public necessity which prompted Congress to offer this land grant aid, and to urge its acceptance and consequent construction through the Indian Territory by stimulating the activity of three separate railroad corporations to hasten construction to its northern boundary in order to make more certain the actual construction of the single road the Government desired and needed across that Territory. It is under such conditions that these land grant acts were passed. While more than a generation has passed since their enactment, and since this road was so constructed, it is obvious that these acts must be interpreted *now*, as they were *offered*, *understood* and *accepted* then.

Defendant's counsel claimed, and the Court of Claims decided, that although the Indian title was extinguished the grant was not vested, because of the *proviso* in Section 9, "Provided, That said lands become a part of the public lands of the United States". It is attempted to define and limit *public lands* of the United States to those only that are subject to sale at the *public land office*, or *to pre-emption or homestead*. We submit that the *proviso* means no such thing. The grant in Section 9 was of "lands through the Indian Territory whenever the Indian title should be extin-

guished by treaty or otherwise", and the *proviso* did not mean that upon the extinguishment of the Indian title the lands should become subject to sale, pre-emption or homestead and nullify the grant to the railroad company, nor did it mean that the *Indian title* could be extinguished by enlarging the tenure of the Indians into fee simple estates in severalty because the fee had been granted to the railroad subject only to the extinguishment of the Indian title. The grant and proviso, read together, meant that the lands should become vested in the railroad company. It meant that the lands should go to the railroad company whenever surveyed and the grant thus made specific. Before the extinguishment of the Indian title, and as a step toward its extinguishment, the lands were surveyed under the laws applicable to the survey of public lands, and when the Indian title was extinguished, instead of allowing the grant to have its effect, passing the granted and surveyed lands to the railroad company, Congress granted and patented the full title to individual Indian allottees and other purchasers. The extinguishment of the Indian title vested in the Government, the owner all the while of the absolute paramount title, the full title, and thereupon the Government fully owned the lands, and the survey thereof as other public lands identified the specific sections, and the grant thereof to claimant ceased to be a float and attached to the specific lands thus identified by survey. But the Congress, nevertheless, disposed of the lands by patenting them to the Indian allottees and other purchasers instead of to the railroad company, which was a plain repudiation of the grant to the railroad company and an appropriation of its granted

lands. The argument of the Government's counsel and the decision of the Court of Claims seeks to give the proviso the effect of a *reservation* in the grant of the right of the Government to patent the lands to individual allottees and purchasers. As we have said, there is no such reservation in the grant, and the proviso can be given no such effect. The grant is of the lands whenever the Indian title is extinguished, provided they become a part of the public lands of the United States. Upon the extinguishment of the Indian title, the lands did become a part of the public lands (in the full meaning of those words) of the United States, subject to their disposition, but they had previously disposed of the lands to the railroad company, and *eo instanti* the grant became specific and effective. Congress meant by the grant to give a thing of value, which would bring about the building of the railroad, and that there should be no ambiguity in the grant, and that the lands granted should be secured to the railroad company and should never go to anybody else. While Congress did not specifically bind itself to extinguish the Indian title at any given period of time, it was equally in contemplation that the then existing Indian title would be extinguished by treaty or otherwise and not converted by *hocus pocus* into a fee title in severalty by ignoring the grant of the fee to the railroad company. The Congress had no right to change the tenure of the Indian title so as to destroy and defeat the grant of the railroad company, nor was there any such reserved right given or implied in the grant or in the Indian treaties. The only allotment contemplated was of surface possession and of small tracts of land. All this could have been accomplished without changing the title and tenure of the

Indians and without repudiating the grant of the fee of certain of the lands to us. The allotment as made was never contemplated in 1866 by anybody. The Court of Claims so held, and so has this Court in *Choate v. Trapp, supra.*

It was practically conceded in the brief of counsel for the Government, as contended by us, that the Indian title in the lands granted to the railroad company has been extinguished, and the Court of Claims so held. There was no escape from this. Congress created the *Dawes Commission* for the very purpose of extinguishing it. The laws and treaties made with the Indians conclusively show that it was extinguished, and this Court has so ruled. In the face of this clear and conceded extinguishment of the Indian title, opposing counsel contended, and the Court of Claims held that the *proviso* defeats the absolute grant of the lands to the railroad company, because the granted lands have never been subject to settlement and sale under the Homestead Act or under the Pre-emption Act, or to disposal under any general law of the United States in respect to the disposition of the public domain *other than its grant to us!* The contention is that the proviso meant, provided the lands became subject to settlement and sale under the Homestead Act, or under the Pre-emption Act, or to disposal under some general laws of the United States in respect to the disposition of the public domain other than the act granting same to petitioner. We submit that the proviso had no such meaning, for the grant and proviso together did not contemplate that these lands should be subject to settlement and sale for any such purposes. The proviso did not mean that when the granted lands became public lands they should be the subject of dis-

position to anyone, for they had already been disposed of to the railroad company.

The same idea was covered by another proposition of opposing counsel that by "public lands", as used in the proviso, are meant those that are absolutely owned by the Government; that have been surveyed or may be surveyed, and when surveyed are subject to sale and disposal under general laws, namely, the pre-emption, homestead, timber-culture, desert, timber and stone acts, and the mining laws. Here again they claim that the words in the proviso, "Provided they become public lands", mean surveyed lands, or lands that may be surveyed, and subject to sale and disposal for the purposes there enumerated. It cannot be possible that the phrase "public lands" as used in the proviso has any such meaning, for it was not contemplated that the granted lands should be subject to sale to pre-emptors or homesteaders, or under the timber-culture, desert, timber and stone acts, and mining laws. We again repeat that the lands had already been disposed of under grant to the railroad company. When the Indian title was extinguished the lands were the public lands of the United States in the sense that the whole title was in the United States, and became subject to the grant. Had the railroad grant not been in existence, and the Indian title had been extinguished, then the lands would have become public lands of the United States, to be disposed of under any law which it might pass, to Indian allottees or other purchasers, or for any other purpose that might be designated by any law which was in existence or might thereafter be passed.

Counsel for Government also contended that the words "public lands" are habitually used in our legis-

lation to describe such as are subject to sale or other disposal under general laws.

Our contention is that the extinguishment of the Indian title and the survey and identification of the granted lands made them public lands (in the full meaning of those words), which had already by the previous grant passed to the railroad company. When the Indian title was extinguished and the lands surveyed, the United States, in compliance with its grant, should have let the lands go to the railroad company, and not under general laws, passed at the time, provided for a change in the tenure of the title and their passage to individual Indians and purchasers, in contravention of the railroad grant.

Below, counsel for the Government further contended:

> "In so far as the words 'there is hereby granted' apply to the lands in the Indian Territory, they are further qualified by the words found in the ninth section, viz: 'when the Indian title shall be extinguished', and 'said lands become a part of the public lands of the United States'. That is, when the public survey shall be extended over them; when they are freed from any claim asserted by the Indian tribes; or, in other words, when the United States become the absolute owner of them; and they become subject to sale and disposal under general laws."

Now, as to the lands in question, all these things happened, and they were first granted to your petitioner and then sold and disposed of under other general laws relating to the allotment to the individual Indian and other purchasers, but the very act of making such allotment and sales to others than the railroad

company violated the railroad grant—took from the railroad company the thing that was granted to it.

We treat with entire fairness opposing counsel and the Court of Claims when we say that the meaning and intent of their argument as to the proviso, "Provided the lands become a part of the public lands of the United States", is an attempt to add a sub-proviso thereto, "Provided, further, that the United States reserve the right to defeat the land grant to the railroad company by extinguishing its title and the national tribal title and by allotting and patenting the fee simple title to the lands to individual Indians and other purchasers". This meaning would not only annul the granting clause of the grant, but would annul the original proviso itself.

The Indian title having been extinguished, by treaty or otherwise, and the lands having been surveyed, and the United States having assumed disposition of them, the granted lands became a part of the public lands of the United States, within the meaning of the proviso of Section 9, under which the grant was made, and their allotment or conveyance to others than the railroad company violated the grant. The only thing that stood in the way of the whole title being vested in the United States at the time of the railroad grant was the Indian title, and when that was extinguished the Government had no rightful power or authority, as against the railroad company, to dispose to others of the lands granted to the railroad company. Such disposal of the lands granted violated the grant to the railroad company, for they had been already granted to the company.

The words "public lands" have been used with varying meanings as applicable to special acts of Congress, but under all the definitions of the courts, the

lands in question, upon the extinguishment of the Indian tribal title, were public lands of the United States and subject to disposition by it, and passed to the railroad under its previous grant. The decision of this Court in Kindred v. Union P. R. R., 225 U. S. 582 (decided since the decision of the Court of Claims in the case at bar) is conclusive on this point. The United States had the power to dispose of the lands in violation of the treaties with and patents to the Indian nations and tribes, if it saw fit. The Government did not, in the railroad grant, ignore, but respected, the Indian title, and granted the lands to the company whenever the Indian tribal title was extinguished. The meaning of the grant was that when the Indian title was extinguished the grant should be absolute in favor of the railroad company, relating back to the date of the grant, or, at all events, to the date of the extinguishment of the Indian title. Before the treaties with and patents to the Indian nations or tribes were made, the lands were public lands of the United States, having been acquired from France. When the Indian title was extinguished, they became public lands, and when the surveys were made of them as public lands then the grant to the railroad company became specific, and the action of the United States in granting them to others, although done in conjunction with the Indian nations and tribes, was a manifest violation of the grant to the railroad company. The construction placed upon the proviso by the Government, that there was a right to extinguish the Indian title, survey the lands as public lands, and then give the absolute fee to the allottees and purchasers of the lands, would make the proviso nullify the grant to the railroad company. It is fundamental that a proviso must be strictly construed,

and cannot be so construed as to nullify the grant, because, if such is its meaning, it would render the proviso entirely void.

In order that the proviso excepting certain things from a grant be valid, it must be a part of the thing granted, for, if the exception extend to the whole, it will be void (4th Cruise Dig. 271.)

In United States v. Dickson, 15 Pet. 141, this Court held, in a decision by Justice Story, that the general rule of law has always been and has become consecrated as almost a maxim in the interpretation of statutes, that

> "Where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly and takes no case out of the enacting clause which does not fall fairly within its terms. In short, a proviso carves *special exceptions only* out of the enacting clause; and those who set up any such exception must establish it as being within the words as well as within the reason thereof."

To same effect is Lewis' Southerland Statutory Construction, Sec. Ed., Sec. 352, and numerous cases cited.

In Thornhill v. Hall (2 Clark and Finley 36), the Lord Chancellor said:

> "I hold it to be a rule that admits of no exception in the construction of written instruments, that *where one interest is given, where one estate is conveyed, where one benefit is bestowed in one part of an instrument by terms upon which, if it stood alone, no man breathing, be he lawyer or be he layman*, could entertain a doubt, in order to reverse that opinion to which the terms would of themselves, and standing alone have led, it is not sufficient that you should *create a doubt; it is not*

sufficient that you should deal in probabilities, but you must show something in another part of that instrument which is *as decisive the one way as the other terms were decisive* the other way, and that the *interest first given cannot be taken away, either by tacitum* or *dubium*, or by *possibile* or even by *probibile*, but that it must be taken away, and can only be taken away by *expressum et certum.*"

In the case of Baggaley v. Pittsburg, Etc., Iron Co., 90 Fed. Rep., *l. c.* 638, Judge Lurton, now Mr. Justice Lurton, speaking for the Court of Appeals of the Sixth Circuit, said, concerning provisos, this:

"Such clauses are often *introduced from excessive caution* and for the purpose of preventing a possible misinterpretation of the act by including therein that which was not intended. The rule is, therefore, not one of universal obligation, and must yield to the cardinal rule which requires a court to give effect to the general intent if that can be discovered within the four corners of the act. If such general intention would be defeated by construing the act as embracing everything of the same general description as those particularly excepted therefrom, an arbitrary application of the rule is not admissible. Tinkham v. Tapscott, 17 N. Y. 141."

In Wayman v. Southard, 10 Wheat., *l. c.* 30, Mr. Chief Justice Marshall said that

"The proviso is generally intended to restrain the enacting clause, and to *except something* out which would otherwise have been within it, or, in *some measure*, to modify the enacting clause."

In Minnis v. United States, 15 Pet., *l. c.* 445. Mr. Justice Story said:

"The office of a proviso, generally, is either to except *something* from the enacting clause, or to qualify or restrain its generality, or to exclude some *possible ground of misinterpretation of it*, as extending to cases not intended by the legislature to be brought within its purview."

In *In re Matthews*, 109 Fed., *l. c.* 614, it was held:

"The office of a proviso, generally, is either to except something from the enacting clause, to restrain its generality, or to exclude some possible ground of interpretation of it, as extending to cases not intended by the legislature to be brought within its purview. Minis v. U. S., 15 Pet. 423, 10 L. Ed. 791; Wayman v. Southard, 10 Wheat. 1, 6 L. Ed. 253. *A proviso in a statute is to be strictly construed. It takes no case out of the enacting clause which is not fairly within the terms of the proviso.* U. S. v. Dickson, 15 Pet. 141, 10 L. Ed. 689. *A corrollary to this proposition is that no proviso should be construed so as to destroy the enacting clause, for it is fundamental in the construction of statutes that, if possible, a statute should be so construed as that all parts of it shall stand.*"

In White v. U. S., 191 U. S., *l. c.* 551, Mr. Justice Day said:

"It is undoubtedly true that in congressional legislation provisos have been included in statutes which are really independent pieces of legislation, but this is a misuse of the usual purpose and effect of a proviso, which is to make exception from the enacting clause, to restrain generality and to prevent misinterpretation. Minis v. U. S., 15 Pet. 423. *If possible, the act is to be given such construction as will permit both the enacting clause and the proviso to stand and be construed together with a view to carry into effect the whole purpose of the law.* 1 Kent. 463. *The purview of the act*

and the words of the proviso must be reconciled if may be, and the operation of the proviso may be limited by the scope of the enacting clause."

In Ryan *et al.* v. Carter *et al.*, 93 U. S. 78, this Court expressly held "the general rule of law is that a proviso carves *special exceptions only* out of the body of the act, and that those who set up any such exception, must establish it."

The facts in that case were quite similar to the case at bar and this Court held that the purpose of the proviso was "to guard against the *possibility of conflict*", and that the object of both provisos in that case was to "*protect individual rights and prevent conflict of titles.* The grants of the New Orleans Commons in the one case and of the village lots in the other were simply on the condition that no adverse claimant should be injured by them." So, in the case at bar, the purpose of the provisos was to protect, beyond question, the possessory rights of the Indians and the Indian title and the only exception to the grant to the Railroad Company was the right of possession until the Indian title should be extinguished. The first condition, or proviso, "whenever the Indian title shall be extinguished by treaty or otherwise", conclusively shows that the word "whenever", as in this clause used, was tantamount to a grant of lands to the Railroad Company *subject only to the Indian title, however* it might be extinguished. There is certainly no suggestion that it might be enlarged into the fee so as to defeat the grant of the fee to the Company. To the same general effect is the case of Savings Bank v. United States, 19 Wal. 227, where, among other things, this Court held that "a construction of a proviso to an act which makes the *proviso plainly repugnant to the*

body of the act, is inadmissible." The Government's construction and the construction the Court of Claims placed upon these provisos renders the whole act vain, meaningless and absurd, and would put the Government in the attitude of (using the words of the Court of Claims) *not acting in good faith in a transaction involving the national honor*—a thing not to be considered.

In Wall v. Cox, 101 Fed. Rep. 409, the Court said:

> "That exceptions should be strictly construed is elementary, and if an interpretation of an act will give effect to its several provisions, as against one that will only partially accomplish this purpose, can be arrived at, it should always be adopted. *An exception should not be so construed as to wholly destroy the grant of which it forms a part.* U. S. v. Dickson, 15 Pet. 141, 165, 10 L. Ed. 689; Dollar Sav. Bank v. U. S., 19 Wall. 227, 22 L. Ed. 80; Ryan v. Carter, 93 U. S. 78, 23 L. Ed. 807."

In re Woodbury, 98 Fed. Rep. 836, the Court said:

> "First. It violates the cardinal principle of statutory interpretation that an exception ought *not to be so construed as to wholly destroy the grant to which it is attached.* Dollar Sav. Bank v. U. S., 19 Wall. 227, 22 L. Ed. 80; Ryan v. Carter, 93 U. S. 78, 23 L. Ed. 807; U. S. v. Dickson, 15 Pet. 141, 10 L. Ed. 689."

To the same effect is U. S. v. Sapinkow, 90 Fed. Rep. 659, and Carter v. Hobbs, 92 Fed. 599.

There is another cardinal rule reinforced by all the authorities, that such an interpretation must be adopted, if possible, as not to make the proviso repugnant to or inconsistent with the granting clauses or purview of the whole act.

The general rule is that a proviso shall be construed with reference to the *immediately preceding part* of the clause to which it attaches. Boynton v. People, 46 N. E. 791; Sutherland Stat. Cons., Sec. 352, 2nd Ed., and numerous cases cited; State v. Bellew, 56 N. E. 782; Zumstein v. Mullin, 66 N. E. 140.

Applied to the case at bar, the second proviso should be construed as applying only to the clause immediately preceding that proviso, namely, "Not to exceed the ratio per mile granted in the first section of this act." In other words, that proviso was not inserted for the purpose of defeating the entire grant or making the entire grant conditional thereon, but as a limitation on the right of the Company to take possession of twenty sections of land contiguous to any given mile, except on that particular condition. There was an absolute *present grant of title to all the lands* and the right of possession only as to all of it was excepted and suspended until the Indian title, an estate by limitation, terminated, and the right of possession of any particular twenty sections for any given mile was suspended until and unless there were so many sections which had become public lands.

> "A 'limitation' marks the period which determines the estate, without any act on the part of him who has the next expectant interest. On the happening of the prescribed contingency, the estate first limited comes at once to an end, and the subsequent estate arises." Church in Brattle Square v. Grant, 69 Mass. (3 Gray) 142, 147; 63 Am. Dec. 725.
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> "A limitation is inclusive of the time of continuance and of the extent of the estate granted, and beyond which it is declared that its creation is not to be extended or continued. Limitations

render an estate void without entry. Smith v. Smith, 23 Wis. 176, 181; 90 Am. Dec. 153.

"A limitation determines an estate upon the happening of the event itself, without the necessity of doing any act to regain the estate. The distinction between an estate upon condition and the limitation by which an estate is determined upon the happening of some event is that in the latter case the estate reverts to the grantor, or passes to the person by whom it is granted, by limitation over, upon the mere happening of the event upon which it is limited, without any entry or other act. Hoselton v. Hoselton, 65 S. W. 1005, 1006, 166 Mo. 182."

As applied to the case at bar these authorities conclusively show that the provisos were simply inserted for the purpose of suspending the right of possession in the Railroad Company until the estate by limitation of the Indian Tribes expired by the extinguishment of the Indian title, and that the right of possession should immediately attach to the grant of the reversionary interest of the United States to the Railroad Company upon the extinguishment of the Indian title and not before. The provisos were simply precautions on the part of the United States to make it entirely clear that there was to be no conflict between the Railroad Company and the Indians as to possession so long as the latter occupied the land under their Indian title—that there was to be no premature scramble for the possession of the lands on the part of the Railroad Company, and emphasize the fact that the Government and the Railroad Company both clearly understood there was a *present grant of title* subject to the Indian title with the *right of possession only suspended or deferred* until the prior estate terminated.

In United States v. Blendauer, 128 Fed. 910 (Circuit

Court of Appeals, 9th Circuit), it is held that the words "public lands" are not always used in the same sense in acts of Congress, and that there is no statutory definition of the words "public lands", and that they should be given such meaning in any act as comports with the purpose and intent of Congress. The Court said:

> "The contention of appellee that they were not public lands, because these words indicate only such lands belonging to the United States 'as are subject to sale or other disposition under general laws' (Wilcox v. Jackson, 13 Pet. 498, 513, 10 L. Ed. 264; Leavenworth L. & G. R. Co. v. United States, 92 U. S. 733, 23 L. Ed. 634; Newhall v Sanger, 92 U. S. 761, 23 L. Ed. 769; Bardon v. R R. Co., 145 U. S. 535, 2 Sup. Ct. 856, 36 L. Ed. 806 Mann v. Tacoma Land Co., 153 U. S. 273, 14 Sup Ct. 820, 38 L. Ed. 714; Barker v. Harvey, 181 U. S. 481, 491, 21 Sup. Ct. 690, 45 L. Ed. 965), cannot be sustained. The words 'public lands' are not always used in the same sense. Their true meaning and effect are to be determined by the context in which they are used, and it is the duty of the court not to give such a meaning to the words as would destroy the object and purpose of the law or lead to absurd results. There are many cases where the courts have been called upon to decide the meaning of these words. In United States v. Bisel, 8 Mont. 20, 50, 19 Pac. 251, the Court, after referring to the decision in the Wilcox v. Jackson, Newhall v. Sanger, and other cases, said:
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> " 'There is no statutory definition of the words "public lands", and the meaning of them may vary somewhat in different statutes passed for different purposes, and they should be given such meaning in each as comports with the intention of Congress in their use.' "

In the case of United States v. Minidoka & S. W. R. Co., 190 Fed. 491, the Court said:

"(1) The first question is: Are these entered lands 'public lands of the United States'? In Winona & St. Paul R. R. Co. v. Barney, 113 U. S. 618, 624, 625, 5 Sup. Ct. 606, 609 (28 L. Ed. 1109), the Supreme Court had before it a controversy respecting rights under grants to certain railroad companies. The Court said with respect to the construction of these grants:

" 'The solution of these questions depends, of course, upon the construction given to the acts making the grants; and they are to receive such a *construction as will carry out the intent of Congress*, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyance. *To ascertain that intent, we must look to the condition of the country when the acts were passed, as well as to the purpose declared on their face, and read all parts of them together.*'

"In United States v. Blendaur, 128 Fed. 910, 63 C. C. A. 636, 639, this Court said:

" 'The words "public lands" are not always used in the same sense. Their true meaning and effect are to be determined by the context in which they are used, and it is the duty of the Court not to give such a meaning to the words as would destroy the object and purpose of the law or lead to absurd results.'

"If we look at the several provisions of this act, we find that it includes as 'public lands' not only lands to which no claims or rights have attached, *but specifically includes lands to which possessory*

claims have attached, for in section 3 it is provided that the Legislature of the proper territory may provide for the manner in which private lands and possessory claims on the public lands may be condemned.

"It is further provided that:

"'Where such provision shall not have been made, such condemnation may be made in accordance with section three of the act approved July 2, 1864 (Act July 2, 1864, c. 216, 13 Stat. 357).'

"That is to say, the act grants the right-of-way through the public lands of the United States, and, if upon any of the public lands through which a right-of-way is required there is a *possessory claim*, the railroad company can proceed to acquire a right-of-way from that claim in the manner specified. *But for the purpose of the act the mere possessory right of the settler does not remove the land from the legal classification as 'public lands of the United States'*, and the *homestead settler* under the provisions of the reclamation act has certainly nothing more than *a possessory right prior to the time when he shall have paid for the land and for the water charges as provided in the act.* In the present case none of the homestead entrymen have made final proof or received a final certificate or a patent for the land. Neither have they or any of them repaid the United States for any part or installment of the cost of construction of said reclamation project. These claims are therefore nothing more than possessory; and the lands to which they relate, public lands of the United States.

"But it is contended *on the part of the United States that no right of way can be acquired by the railroad company* over the lands included in the reclamation project under the act of March 3, 1875, for the reason that they had been *previously with-*

drawn under the second form authorized by the reclamation act for the accomplishment of a *governmental purpose authorized* by law, and were excluded from railroad appropriation by section 5 of that act, which provides:

"'This act shall not apply to any lands within the limits of any military park or Indian reservation, or other lands specially reserved from sale.'

"The contention is that lands withdrawn under the second form of the reclamation act are 'specially reserved from sale'. *We cannot agree to this construction of the act.* It seems to us to provide directly to the contrary. The title of the act is:

"'An act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands.'

"One of the stipulations in the record of this case is that:

"'All the lands under said Minidoka project and the extension thereof are arid in character and require irrigation to produce agricultural crops thereon, but are productive when irrigated.'

"Being arid lands, they are not salable in their natural condition, but a system of reclamation and irrigation is provided by the act to make the lands salable, and, being salable, they are offered for sale. They are not specially or otherwise reserved from sale, but are offered for sale under specified conditions. It follows that the Act of March 3, 1875, 'granting to railroads the right of way through the public lands of the United States', is applicable to these lands."

In the case of United States v. Denver & R. G. R. Co., 190 Fed. 825, the Court said:

"We now note that the sole contention of complainants' counsel, as we understand it, is that the lands on which much of the cutting was done, being at the time the Act of June 8, 1872, was passed, within the Ute reservation, such lands cannot be considered 'public lands' within the meaning of said act. *The United States owned the fee in the land within the reservation.* The Indians were given the *right of occupancy* and such use as they saw fit to make of it. *The United States could convey the fee, subject to such rights as were given by the treaty,* and make such use of them during the existence thereof as they saw fit, not inconsistent with the rights of the Indians. M., K. & T. Ry. Co. v. Roberts, 152 U. S. 114, 14 Sup. Ct. 496, 38 L. Ed. 377; Spalding v. Chandler, 160 U. S. 394, 403, 16 Sup. Ct. 360, 40 L. Ed. 469; Buttz v. N. P. R. R., 119 U. S. 55, 7 Sup. Ct. 100, 30 L. Ed. 330; Beecher v. Wetherby, 95 U. S. 517, 24 L. Ed. 440.

"In United States v. Blendaur, 128 Fed. 910, at page 913, 63 C. C. A. 636, at page 639, it is said:

"'*The words "public lands" are not always used in the same sense; their true meaning and effect are to be determined by the context in which they are used and it is the duty of the Court not to give such a meaning to the words as should destroy the object and purpose of the law or lead to absurd results.*'

"The Court then proceeds to approve the following found in United States v. Bisel, 8 Mont. 20, 19 Pac. 251:

"'*There is no statutory definition of the words "public lands"*, and the meaning of them may vary somewhat *in different statutes passed for different purposes, and they should be given such meaning in each as comports with the intention of Congress in their use.*'

"The treaty of 1868 expressly provided that

railroads should have the right-of-way through the reservation if, in the opinion of the President, the public interests required. *The Ute reservation was a vast territory; it comprised a parallelogram in the southwestern part of the Territory extending approximately two hundred miles north and south and one hundred and twenty-five miles east and west.* It was apparent to Congress, from the original articles of incorporation of the railway company, that both its Western Colorado Railway and its San Juan Railway would cross the reservation. The two lines last referred to and other lines designated in the original articles of incorporation *were projected entirely through a mountainous country in which railroad building is, of course, unusually expensive. It was then an undeveloped and frontier country.* The population of the Territory was less than forty thousand in 1870. It would have been an almost impossible thing to have brought the materials by the railroad company, and named in the act, into the reservation from points beyond its borders. *Lex non cogit ad impossibilia.* It cannot be believed that Congress, by the act, intended to withhold from the railway company the right to take from lands adjacent to its lines within said reservation stone, timber, earth, water and other material for the construction and repair of such lines. *Under such conditions 'public lands', as used in the act, must be construed to include lands within said reservation*, and that the act gave the right to the railway company to take the materials named therefrom for the purposes expressed, *and that the right was not in conflict with the rights given to the Indians under the treaty.*"

The case of Newhall v. Sanger, 92 U. S. 761, so much

relied upon by counsel for the Government, is not in point, much less conclusive against our contentions.

In that case the ownership of a certain quarter section of land in California was involved. The complainant claimed the land under the Western Pacific Railroad Company, to which company a patent was issued in 1870, in professed compliance with one of the Pacific Railroad acts. The defendant claimed title under one Ransom Dayton, the holder of a patent of later date, which recited that the land was in the *exterior limits of a certain Mexican grant*, and that a patent had by mistake been issued to the railroad company. The Pacific Railroad Act covered only *public lands*. The land embraced in the Mexican grant was within the limits of the railroad grant. The *Mexican grant* was before a *land commission for adjudication at the time of the passage of the railroad grant*. It was held that the land covered by the *Mexican grant was sub judice* and was not *public land* within the construed meaning thereof when used alone, at the time of the grant to the railroad.

The grant to the railroad company only purported to cover *public lands by name*, and the case does not decide that there could not be a grant of *Indian or other reserved lands* whenever the Indian title is extinguished if an intention to do so is disclosed.

The case does not decide that in order to be public lands they must be subject to sale under an existing statute, but only to sale or *other disposition under general laws*, theretofore enacted or thereafter enacted.

The Sanger case, like all of the other cases relied upon by the Government, clearly shows that the words "public lands" have no fixed or definite meaning in land grants, but that, as a matter of construction,

where grants are limited to "public lands", *eo nomine*, and *no different intention* is shown by the context, that the grant is restricted to lands which are public lands in the broadest sense, that is to say, in no way incumbered, or "reserved", or "withdrawn", etc. But, as plainly appears, our grant was not a grant limited by its terms to "public lands" by name, but, on the contrary, was a grant of lands in the Indian Territory, that is to say, a grant of Indian lands, subject to the extinguishment of the possessory rights of the Indian tribes. At the time of the grant all the lands in the Indian Territory were in possession of the Indian tribes, and it is for that reason that the grant was made not of "public lands", but of lands in the Indian Territory—Indian lands—subject to the right of occupancy in the tribes.

The contention of counsel for the Government is, that before the railroad grant could attach to these lands they would have first had to become subject to some law of Congress, other than the railroad grant, providing for the disposition or sale thereof to other parties. This is both a novel and an absurd contention, and if such a construction should be given the proviso it would nullify the whole grant. Their disposition was provided for, and had already been made, in the railroad grant, effective *eo instanti* upon the extinguishment of the "Indian title". It will not, we suppose, be denied that much of the public lands of the United States have been disposed of by grants to railroad companies—that has always been one method of disposal thereof.

The ownership of all lands of the United States is either public or private. There are no lands held in this country as crown lands. The lands either belong to the public (the Government) or to private citizens.

They must occupy one status or the other. There is no statutory definition of the words "public lands", except the constitutional definition, "property belonging to the United States". This does not mean that in order that lands should belong to the United States they must be subject to acquisition, by purchase or otherwise, by citizens (the public) under some existing law. In the 19th volume of the American & English Encyclopedia of Law, page 306, these words are defined as follows:

> "The term 'public lands', in its broadest sense, comprehends all land in the possession or ownership of the Government, as distinguished from land possessed by private individuals."

Article 4, Section 3, of the Constitution of the United States, provides that "Congress shall have power to dispose of and make all needful rules and regulations respecting the *territory or other property belonging to the United States*". Counsel for the Government contend there can be no public lands, except such as Congress has already provided for the general disposition of. There must be lands or interests therein belonging to the Government before they can be disposed of. The disposition which Congress sees fit to make of particular parts of the public lands cannot determine their existence. If counsel for the Government are correct, then if the next Congress should repeal all of the existing laws providing for the disposition of the public lands of the United States, such repeal would *ipso facto* destroy the public lands themselves. None of the cases relied on by the Government sustain the contention of its counsel. Starting with Newhall v. Sanger, 92 U. S. 761, down to the present time, there have

been no decisions to the effect that there are no public lands except those which are presently subject to sale. On the contrary, that decision, and all others, are to the effect that those are public lands which are subject to sale, "or other disposition under general laws of Congress", that is, lands belonging to the United States and over which it has dominion and disposing power. This power may be exercised, or not exercised, in whatever manner the Congress of the United States may see fit. The decision of this Court in Kindred v. U. P. R. R. *supra*, we submit, finally determines this question in our favor.

By Section 2257, R. S. United States, being an act of June 2, 1862, it is provided that "all lands belonging to the United States to which the Indian title has been or may hereafter be extinguished, shall be subject to the right of pre-emption, under the conditions, restrictions and stipulations provided by law". It will be observed that the words "public lands" are not used in this act, but "all lands belonging to the United States". This pre-emption act was repealed by the act of March 3, 1891, 26 Stat. L., 1097. But if we may look to laws covering the disposition of certain lands as determining what are public lands, then it would follow that if this pre-emption act were still in effect, immediately upon the extinguishment of the Indian title to the lands in question they would have become subject to the pre-emption act, except for the grant thereof to your petitioner, by which they had already passed to it.

The words "public lands" and "public domain" mean one and the same thing. When Congress passes an act directing the appropriation and disposition of land covered by prior grants forfeited for non-fulfil-

ment of conditions, occupation, etc., such an act is equivalent to an office found, and reunites the land to the public domain. United States v. Repentnigy, 5 Wall. 211; McNicken v. United States, 92 U. S. 204.

In Van Brocklin v. State of Tennessee and Others, 117 U. S. 151, it was held that the "United States do not and cannot hold property as a monarch may, for private or personal purposes". In the course of his opinion, Justice Gray specifically held that the United States cannot "hold lands as a private proprietor for other than public objects", so that under this decision it is clear that all of the lands of the United States are public lands, and continue to be so until disposed of. But it is clear that in order to be public lands it is not necessary that they be disposed of to pre-emptors or homesteaders, for much of the public lands have been otherwise disposed of. If the homestead laws should be repealed, that would certainly not change the status of the public lands.

If we view this case from the standpoint of grants or contracts to convey land as between individuals, we must come to the conclusion that the United States could not enlarge the Indian title of occupancy to a patent title from the Government, to the prejudice of the railroad company, for it is well settled that where individual A sells or agrees to sell real estate to individual B, and thereafter A sells to individual C, A is liable to B for the value of the land.

Hopkins v. Lee, 6 Wheat. 109;
Phillips v. Hornden, 78 Tex. 378 (s. c. 14 S. W. 857);
Mitchell v. Simons, 53 S. W. 76;
Dustin v. Newcomer, 8 Ohio 49;
Kady v. Brown, 25 Pac. 457;
Johnson v. McMullin, 21 Pac. 701;
Hopkins v. Young, 11 Mass. 302.

Likewise, where individual A holds the title to lands and conveys to B a life estate or tenancy for years, and thereafter A sells or contracts to sell his remaining estate, which is the reversionary estate, to C, B cannot take a grant or a contract for a grant from A enlarging his estate to a fee-simple title so as to cut out C. C's interest becomes vested and he cannot be deprived of it without his consent. Such a grant or contract with B would breach the contract with C, and if the latter was damaged he could recover damages from A, as expressly decided by this Court in Choate v. Trapp, 224 U. S. 665, and Reichert v. Felps, 6. Wal. 160.

This is the law and fundamental justice. As applied to the case at bar, the scheme of the Government to enlarge the Indian title of occupancy to a patent title to individual patentees, allottees or purchasers, was a breach of the grant to the railroad company for which the Government is liable in damages.

We submit that we have demonstrated that the act of July 25th, 1866, was a direct grant to the railroad company, and that the lands granted were those in the place limits and also those within the indemnity limits; that the grant within the place limits was a grant *in praesenti*, and that the grant within the indemnity limits was a grant *in futuro*. It matters not, however, whether the act was a grant or a contract for a grant, for, having been performed on the part of the railroad company, if a grant it could not be displaced, and if a contract for a grant it could not be broken, without responsibility on the part of the Government. Counsel for Government have contended that even if the Land Grant Act was a grant, or a contract for a grant, the Government had the power, without responsibility, to

annul the grant or violate the contract. The fact of the assertion of such a proposition by the Government is a confession of doubt and fear that it has failed to maintain the proposition that there was no grant or contract for a grant. If there was no grant or contract for a grant, then it would not be necessary to advocate the proposition of the rightfulness of governmental rescission of its grants and contracts. We contend that the rescission of an executed grant, or repudiation of an executed contract, is without any sort of justification, and is beyond the legitimate power of the Government. The grant or contract is property, and cannot be taken from the railroad company without due process of law. The grant or contract, one or both, is protected by the Fifth Amendment to the Constitution of the United States. If either or both are taken without due process of law, then the United States is liable for the value of what is thus wrongfully taken. The acts of Congress establishing the Court of Claims make the Government liable for breaches of its grants or contracts. We must confess our surprise at the attitude of the Government's counsel in proclaiming as boldly as they have the doctrine of repudiation and confiscation. The purpose of giving the Court of Claims jurisdiction in suits for damages, where the Government takes the property of citizens or violates its grants or contracts with them, was to establish the wholesome doctrine that the Government cannot take property or violate its contracts without being responsible therefor.

The language of Section 9 of the Act of July 25, 1866 (14 Stats., 236-239), by its plain terms, imports a grant *in praesenti*. The language is:

> "That the *same grants of land through the Indian Territory ARE HEREBY MADE*, as provided in

> the first section of this act, whenever the Indian title shall be extinguished, by treaty or otherwise, not to exceed the ratio per mile granted in the first section of this act: Provided, That said lands become a part of the public lands of the United States."

In Missouri, Etc., Railway Company v. Kansas Pacific Railway (97 U. S. 491), the Court, at page 497, said:

> "It is always to be borne in mind, in construing a congressional grant, that the act by which it is made *is a law as well as a conveyance*, and that such effect must be given to it as will carry *out the intent of Congress. That intent should not be defeated by applying to the grant, the rules of the common law, which are properly applicable only to transfers between private parties. To the validity of such transfers it may be admitted that there must exist a present power of identification of the land;* and that where no such power exists, instruments, with words of present grant, are operative, if at all, only as contracts to convey. *But the rules of the common law must yield in this, as in all other cases, to the legislative will.*"

In thus seeking "the intent of Congress", in respect to the matter here involved, the surrounding circumstances and conditions (the relevant *res gestae*) throw a flood of light upon the meaning of Congress in respect of Section 9.

(1) The ultimate title, in respect of all lands held in Indian occupancy, whether by original possession, by treaty, or by patent issued under treaty, then rested in the United States. The Indian title, as such, and in whatever forms created, was a common or tribal title,

and assuming its sacredness in the highest degree, it was only a right to *hold* as *then held* and the *ultimate title* necessarily was vested in the United States as sovereign.

(2) The treaties and grants to the Five Civilized Tribes were hence made to them in express language, as distinct nations or tribes. The nation or tribe—not the individual—was the unit, and the condition, in legal effect, in each patent or conveyance, conveyed the lands to each nation or tribe while each existed as a nation and continued to live on it.

Down to the time when these treaties of 1866 were made with the Five Civilized Tribes (and, indeed, ever since) the United States dealt with the Indian tribes as units and made treaties with them as such through their individual chiefs. Indeed, after treaties with the Indians in form were discontinued, and agreements substituted in their place to become binding on their ratification by act of Congress, the United States dealt with each tribe through its chiefs or delegates, and did not undertake to secure the individual assent of each member of the tribe to such agreements. The Indians spoke and acted through their head men. Such being the long-settled policy of the United States in dealing with the Indians in their tribal capacity, and from the inception of our Government, it is plain that Section 9 of the cited acts of 1866 (July 25 and 26) were enacted at a time when Congress recognized this long settled policy, and must hence be read and interpreted in the light thereof. In other words, Congress made the grant of lands through the Indian Territory in clear and specific language. The words: "That the same grants of lands, through the Indian Territory, are hereby made, as provided in the first section of this

act", import a present grant of the interest of the United States, to-wit, the ultimate title. Congress recognized that the lands were in the occupancy of the Indian tribes and that hence, until such occupancy or Indian title was extinguished, they could not come within the selling and disposing power of the railroad grantee. Hence Section 9 goes on to provide that the grant thus made *in praesenti* of the Government's interest as holder of the ultimate fee, could not come into actual enjoyment and use until the Indian title was extinguished. Hence the continuing language of the grant, "whenever the Indian title shall be extinguished by treaty or otherwise".

This language did not enlarge "the Indian title" in any way. What it meant to describe was the common tribal title held by the nation or tribe as such, and most certainly did not then contemplate or recognize the existence of any individual title in any member of the tribe or nation. All of the Indians, as a collective family, were in possession and use of the lands, but the Indian title as such was guaranteed by treaty and patent, precisely as in all other Indian treaties then and theretofore existing, and as describing the common or tribal title recognized by the United States as vested in such tribal or communal manner.

This proposition was directly involved and as distinctly affirmed by this Court in the recent case of Fleming v. McCurtain, 215 U. S. 56, fully cited *infra*.

When the grants of 1866 were made the Five Civilized Tribes occupied the Territory each as an organized Indian political community, governed by tribal law and custom. And this communal interest, known as the Indian title, was in no sense affected by the mere fact that, as between themselves, individuals of each

tribe or nation were permitted to occupy or use specific tracts. Such occupation was by common consent or license, but did not and could not operate to segregate any part of the common tribal title or otherwise affect it.

Counsel for the Government and the Court of Claims wholly overlooked Section 11 of the Act of Congress of July 25, 1866. The relevant portion of that section (14 Stats., p. 238) is as follows:

> "And provided further, That should the Leavenworth, Lawrence & Fort Gibson Railroad Company, *or the Union Pacific Railroad Company, Southern Branch*, construct and complete its road to that point on the southern boundary of the State of Kansas, where the line of said Kansas & Neosho Valley Railroad shall cross the same, before the said Kansas & Neosho Valley Railroad Company shall have constructed and completed its said road to said point, *then and in that event the company so first reaching in completion the said point on the southern boundary* of the State of Kansas shall be authorized, upon obtaining the written approval of the President of the United States, to construct and operate its line of railroad from said point to a point at or near Preston, in the State of Texas, *with grants of land according to the provisions of this act*, but upon the further special condition, nevertheless, that said railroad company shall have commenced in good faith the construction thereof before the said Kansas & Neosho Valley Railroad Company shall have completed its said railroad to said point; and provided, further, That said other railroad company, so having commenced said work in good faith, shall continue to prosecute the same with sufficient energy to insure the completion of the same within a rea-

sonable time, subject to the approval of the President of the United States."

Under this section of the act, in view of the fact that claimant complied with all the terms of Section 11, there arose a contractual obligation on the part of the United States to grant the lands claimed through the Indian Territory, if, in fact, they were not actually granted by Section 9, and regardless of the question whether the language contained in Section 9 was a grant *in praesenti* or a grant *in futuro*.

It should be constantly borne in mind that it was under this Act of July 25, 1866, that claimant acquired the right to and did construct its line of railway through the Indian Territory, and not the Act of July 26, 1866. Under the last-named act, claimant acquired the right to and did build its line of railroad through the State of Kansas. The acts, therefore, must be read and considered *in pari materia*.

By Section 11 of the Act of July 26, 1866, it was provided that any railroad company chartered under any law of the United States or of the State of Kansas which was theretofore or might thereafter be recognized by any act of Congress of the United States, might connect, unite and consolidate with the railroad company in whose favor the act of July 25, 1866, was made, namely, the Kansas & Neosho Valley Railroad and its extension to the Red River. And by this section of the Act of July 25, 1866, it was further provided "that should the Leavenworth, Lawrence & Fort Gibson Railroad Company or the Union Pacific Railroad Company, Southern Branch (this claimant), construct and complete its road to that point on the southern boundary of the State of Kansas where the line of the

said Kansas & Neosho Valley Railroad shall cross the same before the said Kansas & Neosho Valley Railroad Company shall have constructed and completed its said road to said point, then and in that event the company so first reaching in completion the said point on the southern boundary of the State of Kansas shall be authorized, upon obtaining the written approval of the President of the United States, to construct and operate its line of railroad from said point to a point at or near Preston, in the State of Texas, with grants of land according to the provisions of this act."

It was under this section that claimant acquired the right to and did construct its line of railroad through the Indian Territory. It complied with every condition and term specified in this Section 11. Thereby the propositions of the Government were accepted and a contract entered into between the claimant and the Government whereby the Government expressly agreed to make a grant of lands to claimant in accordance with the provisions of this act. Throughout the Petition claimant not only asserts that there was a grant of lands under Section 9, but that there was a covenant on the part of the Government to make a grant of lands under Section 11, and that claimant accepted the propositions and terms set forth in Section 11 and thereby the Government became obligated to make the grant as therein specified. At page 32 of the claimant's Petition it is stated:

> "Your petitioner further shows that under and by virtue of the propositions and covenants contained in said Act of Congress of the United States of July 25, 1866, to your petitioner, and by reason of the acceptance thereof by your petitioner, and

> the performance on the part of your petitioner of the conditions contained in said act, as herein and at length set forth, the United States covenanted to and with your petitioner that it would, and by said Act of July 25, 1866, did grant and convey to your petitioner," etc.

That is an express allegation, not only that the Government entered into a contract *to make* a grant of lands under section 11, but that it *did in fact make* the grant by Section 9. On page 34 of the Petition it is stated: "Your petitioner claims that by the construction, completion, maintenance and operation of its railroad through the Indian Territory, as herein shown, it became entitled, under the covenants of the grants of the Act of Congress of July 25, 1866," etc. On page 45 of the Petition it is alleged "that the United States has broken the covenants of its land grants to your petitioner, and failed and refused to patent the said lands to your petitioner", etc. On page 46 it is alleged "the United States broke the covenants of its land grants to your petitioner, to its great damage, as herein shown". On page 71 of the Petition it is alleged that "your petitioner shows that on the faith of the contract between your petitioner and the United States, so as aforesaid entered into, and the grant of lands made to it by the United States in and by said Act of July 25, 1866, your petitioner undertook to and did construct its railway through the Indian Territory". And on page 72 it is alleged "your petitioner further states that upon the strength of the contract between the United States and your petitioner, and the grant of lands, as aforesaid", etc. And on page 73 it is alleged "your petitioner further shows that in every respect it has complied with its obligations as

to the building, maintenance and operation of said railway through the Indian Territory, but the United States, contrary to its obligations and in violation of its said contract with your petitioner, and contrary to its covenants in said grant of said odd-numbered sections of land in the Indian Territory to your petitioner, and contrary to equity and good conscience, breached its said contract and covenants with your petitioner, and its obligations and grants under said contract and said Act of Congress of July 25, 1866". Our proposition is that the grant (and by this comprehensive word we mean the entire Act of July 25, 1866) in question constituted a contract between the United States and the railroad company, and that when the claimant accepted the terms of the grant or act and built its road, doing everything that was required to be done by it, it became an executed contract, and the railroad company acquired a vested interest of which it could not be deprived without a transparent breach of contract.

In Northern Lumber Co. v. O'Brien, 139 Fed. 614, it was held that the grant to the Northern Pacific Railroad Company was one *in praesenti*, and was in terms confined to lands which, at the time of the grant, fell within the terms of the grant—public lands—and that in that case no intention was shown by the act of Congress to include lands which thereafter became public lands or which at the time of the grant were temporarily reserved for other purposes. But Justice Van Devanter, in delivering the opinion expressly recognized the well-established doctrine that where Congress expressly *disclosed an intention of granting lands which for the time being were temporarily reserved, it could do so.* (This Court has since so held in the case of Kindred v. Union P. R. R., 225 U. S.

582). Among other things, the Court, in the O'Brien case, said, page 616:

> "The grant to the Northern Pacific Railroad Company was one *in praesenti* and was in terms confined to 'public lands'. St. Paul & Pacific R. R. Co. v. Northern Pacific R. R. Co., 139 U. S., 1, 5, 11 Sup. Ct. 389, 35 L. Ed. 77. Land not public at the date of the grant was not granted, even though it subsequently became of that character. Bardon v. Northern Pacific R. R. Co., 145 U. S. 535, 539, 12 Sup. Ct. 856, 36 L. Ed. 806; Northern Pacific Ry. Co. v. De Lacey, 174 U. S. 622, 629, 19 Sup. Ct. 791, 43 L. Ed. 1111; United States v. Southern Pacific R. R. Co., 146 U. S., 570, 594, 606, 13 Sup. Ct. 152, 36 L. Ed. 1091. The words 'public lands' have long had a settled meaning in the legislation of Congress, and, when a different intention is not clearly expressed, are used to designate such land as is subject to sale or other disposal under general laws, but not such as is reserved by competent authority for any purpose or in any manner, although no exception of it is made. Bardon v. Northern Pacific R. R. Co., *supra*; Wilcox v. McConnell, 13 Pet., 498, 513, 10 L. Ed. 264; Leavenworth, Etc., R. R. v. United States, 92 U. S. 733, 741, 745, 23 L. Ed. 634; Newhall v. Sanger, 92 U. S. 761, 23 L. Ed. 769; Doolan v. Carr, 125 U. S. 618, 630, 8 Sup. Ct. 1228, 31 L. Ed. 844; Cameron v. United States, 148 U. S. 301, 309, 13 Sup. Ct. 595, 37 L. Ed. 459; Mann v. Tacoma Land Co., 153 U. S. 273, 284, 14 Sup. Ct. 820, 38 L. Ed. 714; Barker v. Harvey, 181 U. S. 481, 490, 21 Sup. Ct. 690, 45 L. Ed. 963; Scott v. Carew, 196 U. S. 100, 109, 25 Sup. Ct. 193, 49 L. Ed. 403. * * *
>
> "* * * It is true that, after the date of the grant to the Northern Pacific Railroad Company

and before the definite location of the line of that company's road, the land was released from the withdrawal, and thereupon became public in the fullest sense of the term; but this did not place it within the operation of a preceding grant *in praesenti* confined to land then public. * * *

"* * * As, however, the line of definite location of the Lake Superior & Mississippi Railroad departed materially from the general route, no title to the land vested in the Lake Superior & Mississippi Railroad Company, and the withdrawal or reservation was modified accordingly; but these matters, occurring subsequently to the grant to the Northern Pacific Railroad Company, and therefore after the time in respect of which the grant must operate as one *in praesenti*, if at all, are without any bearing upon the decision of the present case, unless, as before indicated, there is something in the granting act clearly indicative of an intent on the part of Congress to depart from the settled meaning of the words 'public lands' and to use them in a sense which would embrace lands then withdrawn and reserved for the satisfaction of a prior grant in aid of another railroad. Not only is there nothing in the Act of July 2, 1864, indicative of such intent, but the clear import of the first proviso to Section 3, *supra*, is that there was none. United States v. Southern Pacific R. R. Co., 146 U. S. 570, 605, 13 Sup. Ct. 152, 36 L. Ed. 1091."

In Union Pacific R. R. Co. v. Karges, 169 Fed. 459, it is expressly held that where Congress indicates a purpose to grant lands which have previously been set apart for other purposes, such as Sections 16 and 36 for school purposes, Congress may make a grant of a right-of-way through such reserved lands, and that by such reservation for school purposes they do not cease

to be public lands of the United States. This is a very instructive and important decision as applied to our case, because the lands in the Indian Territory were all Indian lands, and the grant was of lands in the Indian Territory which, though temporarily reserved for Indian occupancy, were still subject to grant by Congress. Among other things District Judge Munger said, page 461:

> "The pleadings in this case present two issues of law simply: First, whether the act of Congress, granting a right-of-way to the Union Pacific Railway Company, granted such right-of-way across sections 16 and 36 that had theretofore been set apart for school purposes; and, second, whether or not respondents have acquired any right to a portion of such right-of-way by adverse possession.
>
> "The several provisions of the statutes applicable to a consideration of this case are hereinafter quoted. Section 16 of the congressional enactment of May 30, 1854, organizing the Territory of Nebraska, is as follows:
>
> "'And be it further enacted, That, when the lands in said Territory shall be surveyed under the direction of the Government of the United States, preparatory to bringing the same into market, sections numbers sixteen and thirty-six in each township in said Territory shall be, and the same are hereby, reserved for the purpose of being applied to schools in said Territory and in the States and Territories hereafter to be erected out of the same.' (Chapter 59, 10 Stat. 277.)
>
> "By this section no grant of the lands was made. It simply constituted a reservation of the sections for the purpose specified. No grant of these sections was made to the Territory or State until the

Enabling Act of April 19, 1864 (Chapter 59, 13 Stat. 47), Section 7 of which reads as follows:

" 'And be it further enacted, The sections numbers sixteen and thirty-six in every township, and when such sections have been sold or otherwise disposed of by an act of Congress, other lands equivalent thereto, in legal subdivisions of not less than one-quarter section, and as contiguous as may be, shall be, and are hereby, granted to said State for the support of common schools.'

"This is the first enactment containing a grant of these sections, and upon the acceptance by the State of the Enabling Act, and the State's admission into the Union, a vested right to these sections was first acquired. Nebraska was organized as a State in February, 1867, and accepted the provisions of the Enabling Act. By such acceptance on the part of the State, it acquired a vested right to sections 16 and 36 in each township which had not, at the time, been in any manner disposed of by the United States. Until such vested right was acquired, Congress had full power and authority to make such disposition of these sections or portions thereof, as it saw fit. State of Minn. v. Batchelder, 1 Wall. 109, 17 L. Ed. 551; Frisbie v. Whitney, 9 Wall. 187, 19 L. Ed. 668; Emblen v. Lincoln Land Co., 184 U. S. 660, 22 Sup. Ct. 523, 46 L. Ed. 736.

"In July, 1862, after the lands in question had been surveyed under authority of the Government of the United States, but before any vested right to them had been acquired, Congress granted to the Union Pacific Railway Company a charter, with power to construct a railroad from a point on the Missouri River westward, and granted to such railroad company a right-of-way over the public lands; the provisions of the act granting the right-of-way being as follows:

"'And be it further enacted, That the right-of-way through the public lands be, and the same is hereby granted to said company for the construction of said railroad and telegraph line; and the right, power and authority is hereby given to said company to take from the public lands adjacent to the line of said road, earth, stone, timber and other materials for the construction thereof; said right-of-way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass over the public lands, including all necessary grounds for stations, buildings, workshops, machine shops, switches, side tracks, turn-tables and water stations. The United States shall extinguish as rapidly as may be the Indian titles to all lands, falling under the operation of this act and required for the said right-of-way and grants hereinafter made.' (Chapter 120, Sec. 2, 12 Stat. 489.)

"This section granted the right of way over the public lands, and, as sections 16 and 36 had theretofore been reserved for school purposes, the contention is that said sections did not, at the time of the passage of this act, fall within the designation of public lands, and hence that the railroad company did not acquire a right-of-way over those sections.

"The true rule respecting the term 'public lands' was stated by Judge Van Devanter, sitting in the Court of Appeals, in Northern Lumber Co. v. O'Brien, 139 Fed. 614-616, 71 C. C. A. 598, 600, in the following language:

"'The words "public land" have long had a settled meaning in the legislation of Congress, and, when a *different intention is not clearly expressed*, are used to designate such land as is subject to sale or other disposal under general laws, but not such as is reserved by competent authority for

any purpose or in any manner, although no exception of it is made. Bardon v. Northern Pacific R. R. Co., 145 U. S. 535, 12 Sup. Ct. 856, 36 L. Ed. 806; Wilcox v. McConnel, 13 Pet. 498, 513, 10 L. Ed. 264; Leavenworth, Etc., R. R. Co. v. United States, 92 U. S. 733, 741, 745, 23 L. Ed. 769; Doolan v. Carr, 125 U. S. 618, 630, 8 Sup. Ct. 595, 37 L. Ed. 459; Mann v. Tacoma Land Co., 153 U. S. 273, 284, 14 Sup. Ct. 820, 38 L. Ed. 714; Barker v. Harvey, 181 U. S. 481, 490, 21 Sup. Ct. 690, 45 L. Ed. 963; Scott v. Carew, 196 U. S. 100, 109, 25 Sup. Ct. 193, 49 L. Ed. 403.'

"These decisions do not conflict with the settled doctrine that, where it clearly appears from the statute that the term 'public lands' is intended to include lands which have theretofore been reserved by Congress for a specific purpose, such intention will prevail, as it is a fundamental rule of construction that a legislative act is to be interpreted according to the plain intention of the legislative body.

"As said by the Supreme Court in Winona & St. Peter R. R. Co. v. Barney, 113 U. S. 618-625, 5 Sup. Ct. 606, 609, 28 L. Ed. 1109, speaking with respect to acts of Congress making grants of certain lands:

" 'They are to receive such a construction as will carry out the intent of Congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyance. To ascertain that intent we must look to the condition of the country when the acts were passed as well as to the purpose declared on their face, and read all parts of them together.'

"To the same effect are Wilkinson v. Leland, 2 Pet. 627, 7 L. Ed. 542; Priesman v. U. S., 4 Dall. 28, 1 L. Ed. 727; U. S. v. Wiltberger, 5 Wheat. 76,

5 L. Ed. 37; Platt v. Union Pacific R. R. Co., 99 U. S. 48, 25 L. Ed. 424."

The Court in this case should approach the decision of the same in the spirit in which the grant was made, considering the general situation at the time, both with reference to the Government and its purposes and the local geography through which the line of railroad was to be constructed. It was a part of the general scheme to build railroads across the continent for the protection of our interests on the Pacific Slope, and also to extend a line through the Indian Territory and Texas to the Mexican boundary to protect our interests and territory along the Mexican boundary line. The case last cited and the decisions quoted therein constitutes a controlling authority upon the proposition that the words "public lands" have no fixed meaning, especially where a clear intention is disclosed by the act of Congress to grant certain lands which have been previously temporarily disposed of, the Court expressly holding that where the term "public lands" is intended to include lands which have theretofore been reserved by Congress for a specific purpose such intention will prevail. It is a fundamental rule of construction that a legislative act is to be interpreted according to the plain intention of the legislative body. The intention in sections 9 and 11 of the act to grant the lands in the Indian Territory is clearly beyond doubt, and is in no way subject to any of the exceptions or limitations in section 1 as applied to the grant of the lands through Kansas.

In Northern P. R. Co. v. United States, 227 U. S. 355, 366, 33 Sup. Ct. Rep. 368, this Court said:

"*If the Government may control the cession and*

control the survey, and by the action of its agents foreclose inquiry or determine it, an easy means of rapacity is afforded, much quieter, but as effectual as fraud. We should hesitate to put the Government in that attitude."

As this court said in Choate v. Trapp, *supra*, "there is a broad distinction between *tribal property* and *private property*, and between the *power to abrogate a statute* and the *authority to destroy rights acquired under such a law*". Whatever power remained in the Government to deal with the *Indian title*, no power remained in the Government to *destroy the rights acquired in the Indian lands under the grant to the Railway Company*. That was a vested property right in no way subject to the *governmental powers* of the United States and, as decided by this court in the case last mentioned, it was a property right "now protected by the Constitution of the United States" and, paraphrasing the language of the Court in that case, "no statute is valid which increased the life estate of the Indians into a fee estate which had already been granted to the Railway Company, and there was no power in the Congress to lessen any of the rights of property which had been vested in the Railway Company. Such rights are protected from repeal by the provisions of the Fifth Amendment".

The word "title" has no special sanctity attached to it. Lord Coke, many years, ago, defined title to be "that by which one holds possession of lands." *The right* by which Indian tribes *hold land* has been over and over again, called *Indian title* by this Court. For instance, in U. S. v. Cook, 19 Wall. 591, this Court, speaking of the Indian *right of occupancy*, said "*this is the title by which* other Indians *hold* their land". And

again this Court said, in L. L. & G. v. United States, 92 U. S. 733, "that in the free exercise of their choice they might *hold* it forever", but they could *only hold* it. The fee was in the United States subject to the right of the Indians to *so hold*. The Dawes Commission, in its various reports expressly found that the Indians would not accept an allotment of their lands in severalty, as provided for in the old Indian treaties—an allotment simply of possessory rights, but would only agree to an allotment upon condition that the *United States would breach its contract with the railroad company and grant to the Indians its reversionary estate in and to the lands, and*, in order to bring about an allotment of this kind, which was a departure from the established practice in the past (as shown by the case of Veale v. Maynes, 23 Kas. Rep. 1, *supra*, decided by Judge Brewer when on the Supreme Bench of Kansas) the Congress of the United States *elected to stand responsible to the railway company as and for the breach of the grant to it of the reversionary interest*, and grant the fee to the lands, including the title of the railroad, to the Indians in severalty and, accordingly, the Act of 1893 was passed, expressly providing that the United States should join in the allotment deeds and grant to the Indians its reversionary interest in the estate therein and thereto. As very properly held by this Court in *Choate v. Trapp, supra*, "this contemplated *most radical changes* in the *political* and *PROPERTY RIGHTS OF THE INDIANS*". That which has been done was never contemplated in 1866 by anyone, either in the Indian treaties, the tribal patents, or in the grant of the lands to the railway company subject to the extinguishment of the Indian title as it then existed. The *radical change* has been made, and if the decision of the

Court of Claims is to stand, wholly at the expense of the railroad company and without its consent. Its property was taken from it by the United States and given to the Indians. This the Government could only do by paying to the railroad company the value of the lands, and the Government, we submit, should not be put in any other attitude. (Northern Pacific R. R. v. United States, 227 U. S. 355, 366, 33 Sup. Ct. Rep. 368.) The passage of the Act of Congress of April 26, 1906, providing that, upon the extinguishment of the Indian title, the lands should not become public lands, was ineffective as against the vested rights of the railroad company. The contract, as between the Government and the railroad company, could not be changed by legislative action upon the part of the Government. (Choate v. Trapp, 224 U. S. 665; Reichert v. Felps, 6 Wall. 160.) The provision of the act referred to was nothing more than a self-serving statement made by one of the contracting parties. What the Act of July 25, 1866, meant was and is a question for the courts and not the Congress.

The Court of Claims expressly found that it had been the policy of the Government in 1866 to acquire Indian lands wherever it could in the interest of civilization, and to remove the Indians to some distant reservation carved out of other public lands, and that the presence of so many Indian tribes in the western country was the result of that policy, and the Court of Claims further expressly found that "*the United States, no doubt, anticipated and had a right to anticipate that such a course might follow in reference to the lands granted in the Act of July 25, 1866*".

* * * "Subsequent to the passage of the act a *different policy was inaugurated by the United States*

with respect to the Indian tribes and tribal lands". The Court of Claims further found that the extinguishment of the Indian title was a contingency which "*was certain to happen in one way or another*".

In Heckman v. United States, 224 U. S. 413, where the legislation of Congress looking to the allotment of lands in the Indian Territory was fully and carefully reviewed, this Court expressly held that under the Indian treaties and tribal patents, the *United States retained a reversionary interest in and to the Indian lands*, and that the Indian title was simply *a title* for *their common use and occupancy*, and that the allotment of the land in severalty as it was allotted, and the conversion of the Indian Territory into a State, was "an exigency" * * * "*originally unforeseen, requiring the adoption of new measures*", and that by the *Act of March 3rd*, 1893, the United States gave *its consent* to the *allotment* of the land in fee and severalty, and agreed to grant its *reversionary interest to the individual* Indians. In this case, this Court expressly held that the Dawes Commission was established for the *purpose of extinguishing the national or tribal title*. In this case, this Court further said:

> "This national interest is not to be expressed in terms of property, *or to be limited to the assertion of rights incident to the ownership of a reversion* or to the holding of technical title in trust. *When, in* 1838, *patent was issued to the Cherokees, providing that it was subject to the condition that the granted lands should revert to the United States if the Cherokee Nation became extinct or abandoned them, neither the rights nor the duties of the United States were confined to the reversionary interest thus secured.*"

THIRD.

The land grant must be considered in the light of the history of the times and condition of the country; what the parties to the grant had reason to believe it meant, the purposes in view in making and accepting the grant. It must be viewed as a law in the nature of a statutory contract. It must be liberally construed in favor of the company that fully executed and relied upon it.

Cherokee Nation v. Journeycake, 155 U. S. 196;
Northern Pacific Railway Company v. Musser-Sauntry Land, Logging and Manufacturing Company, 168 U. S. 604;
Winona & St. Peter Railroad Company v. Barney and Others, 113 U. S. 618;
Nelson v. Northern Pacific Railway Company, 188 U. S. 108;
Missouri, Kansas & Texas Railway Company v. Kansas & Pacific Railway Company, 97 U. S. 491;
United States v. Southern Pacific Railway Company, 146 U. S. 570;
United States v. D. & R. G. R. R., 150 U. S. 1;
Schulenberg v. Harriman, 21 Wall. 44.

In *Cherokee Nation v. Journeycake*, 155 U. S. 196, it was held that (p. 216):

> "In order to determine the meaning of this contract we must place ourselves in the circumstances of the parties at the time, with their surroundings *and expectations*."

In *Northern Pacific Railroad Company v. Musser-Sauntry Land, Logging and Manufacturing Company*, 168 U. S. 604, which case involved the construction of a grant of lands to a railroad, it was said (p. 610):

"In view of the road's traversing a comparative wilderness, it made a grant of enormous extent. * * * It must be presumed that Congress acted and would act in good faith, and of course there could be no intent to deplete this grant to plaintiff by subsequent legislation in respect to land grants."

In *Winona & St. Peter Railroad Company v. Barney & Others*, 113 U. S. 618, the Court, by Justice Field, among other things, said (p. 625):

"The solution of these questions depends, of course, upon the construction given to the acts making the grants; and they are to receive such a construction as will carry out the intent of Congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyance. To ascertain that intent we must look to the condition of the country when the acts were passed, as well as to the purpose declared on their face, and read all parts of them together."

In *Missouri, Kansas & Texas Railway Company v. Kansas & Pacific Railway Company*, 97 U. S. 491, 497, it was said:

"It is always to be borne in mind, in construing a congressional grant, that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress. That intent should not be defeated by applying to the grant the rules of the common law, which are properly applicable only to transfers between private parties. To the validity of such transfers it may be admitted that there must exist a present power of identification of the land; and that where no such power exists,

> instruments, with words of present grant, are operative, if at all, only as contracts to convey. But the rules of the common law must yield in this, as in all other cases, to the legislative will."

To the same effect is *Schulenberg v. Harriman*, 21 Wall. 44. In this case it was held (p. 62):

> "The rules applicable to private transactions, which regard grants of future application—of lands to be afterwards designated—as mere contracts to convey, and not as actual conveyances, are founded upon the common law, which requires the possibility of present identification of property to the validity of its transfer. A legislative grant operates as a law as well as a transfer of the property and has such force as the intent of the Legislature requires."

In *United States v. Southern Pacific Railway Company*, 146 U. S. 570, 597, 598, it is said:

> "Illy as it may accord with the common law notions of identification of tracts as essential to a valid transfer of title, it is fully settled that we are to construe these acts of Congress as laws as well as grants; that Congress intends no scramble between companies for the grasping of titles by priority of location, but that it is to be regarded as though title passes as of the date of the act, and to the company having priority of grant, and, therefore, that in the eye of the law it is now as though there never was a period of time during which any title to these lands was in the Southern Pacific. As said in the case of Missouri, Kansas & Texas Railway v. Kansas Pacific Railway, 97 U. S. 491, 497:
>
> "'It is always to be borne in mind, in construing a congressional grant, that the act by which it

is made is a law as well as a conveyance, and that such effect must be given to it as will carry out the intent of Congress. That intent should not be defeated by applying to the grant the rules of the common law, which are properly applicable only to transfers between private parties. To the validity of such transfers it may be admitted that there must exist a present power of identification of the land; and that where no such power exists, instruments, with words of present grant, are operative, if at all, only as contracts to convey. But the rules of the common law must yield in this, as in all other cases, to the legislative will.'"

In *United States v. Denver & Rio Grande Ry. Co.*, 150 U. S. 1, 14, 15, it is said:

"It is undoubtedly, as urged by the plaintiffs in error, the well-settled rule of this Court that public grants are construed strictly against the grantees, but they are not to be so construed as to defeat the intent of the Legislature, or to withhold what is given either expressly or by necessary or fair implication. In Winona & St. Peter R. R. v. Barney, 113 U. S. 618, 625, Mr. Justice Field, speaking for the Court, thus states the rule upon this subject: 'The acts making the grants * * * are to receive such a construction as will carry out the intent of Congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyance. To ascertain that intent, we must look to the condition of the country when the acts were passed, as well as to the purposes declared on their face, and read all parts of them together.' Looking to the condition of the country and the purposes intended to be accomplished by the act, this language of the Court furnishes the proper rule of construction of the Act of 1875,

> When an act, operating as a general law, and manifesting clearly the intention of Congress to secure public advantages, or to subserve the public interests and welfare by means of benefits more or less valuable, offers to individuals or to corporations as an inducement to undertake and accomplish great and expensive enterprises or works of a *quasi*-public character in or through an immense and undeveloped public domain, such legislation stands upon a somewhat different footing from merely a private grant, and should receive at the hands of the Court a more liberal construction in favor of the purpose for which it was enacted. *Bradley v. New York & New Haven R. R.*, 21 Connecticut 294; *Pierce on Railroads*, 491. This is the rule we think properly applicable to the construction of the act of 1875, rather than the more strict rule of construction adopted in the case of purely private grants * * *."

Alienation by grant is one of the ways in which real property may be conveyed (*Blackstone, Book* 2, *Chap.* 20). The regular method by the common law of transferring property of incorporeal hereditaments or such things, whereof livery could not be made, was by grant, for which reason all corporeal hereditaments were said to lie in livery, and others, such as commons, rents, *reversions*, to lie in grant (*Blackstone, Book* 2, *Chap.* 20). Grants of reversions passed by delivery of the deed, and no livery was necessary (*id.*). A grant "differs but little from a feoffment, except in its subject matter, for the operative words therein commonly used are *dedi et concessi*, have given and granted" (*Id.*)—practically the words of our grant.

The king's grants were matters of public record (*Blackstone, Book* 2, *Chap.* 21). These grants, whether

of lands or franchises, were by letters patent—open letters. The manner of granting by the king did not more differ from that by a subject, than the construction of his grants when made (*id.*). A grant made by the king, *at the suit of the grantee*, was taken most beneficially for the king, and against the party; whereas, the grant of the subject is construed more strongly against the grantor. It therefore became usual to insert in the king's grants, that they were made, not at the suit of the grantee, but *ex gratia*, in which cases the grants were not construed against the grantee (*id.*). It may be truly said that in our case the grants were *ex gratia*, and not at our request; it was a proposition which the Government made to us, and which we afterwards accepted.

We submit that the foregoing discussion has affirmatively established—

1. That the Indian title to the lands in the Indian Territory was in no sense absolute in fee. Whatever the *form* of expression used in treaties and patents thereunder, the ultimate title rested in the United States subject to the Indian *tribal* occupancy, so long as *that* occupation continued.

2. That the United States *could* and *did* grant lands subject to such Indian title and occupancy—the question being always one of *intent*.

3. That the grants of land made in the Acts of July 25th and 26th, 1866, through the Indian Territory, were *offered* to three separate companies, and plainly expressed the urgent desire upon the part of the Government to secure a railroad north and south through that Territory for important governmental purposes, while construction of such a railroad *per se*, and under then existing conditions offered no inducement to private capital as a railroad traffic proposition.

Coming then to consider and ascertain the meaning of the Act of July 25, 1866, making the grant, it is plain that we must place ourselves in the attitude of the *actors* in the business at that time. We must consider the plain public need and desire for the construction of the railroad; the long existing practice and policy of the Government in dealing with the Indians in respect of the extinguishment of Indian titles and opening of such lands to white settlement; the reasonable expectation of all parties that like action would be taken in the future with respect to the lands in the Indian Territory, for it must not be lost sight of that the *area* of such lands was far in excess of any then reasonable requirement of *acreage* for individual allotment. There was then included in the outlying boundaries of that Territory many millions of acres available then for allotment among the Indians then in occupation, and leaving abundant room for the operation of this land grant, with a large surplus beside. It was only the action of the United States taken *after* this grant by the Act of July 25, 1866, was made through settlement of other Indian tribes therein and the direct extinguishment of the Indian right in the large area constituting the Territory of Oklahoma (created in 1890) that available areas for allotment to the original Indian tribes—the Five Nations—originally settled therein became more and more reduced, until all that remained was the area within their *original* settlement in that Territory. We repeat that in 1866, founded on long continued and existing governmental policy and practice, and the knowledge of a *then* vast available area in the Indian Territory more than ample for both the operation of any land parceling scheme of allotment and to satisfy the railroad grant, it was

the just and reasonable expectation of all parties—governmental and individual—that the rapid settlement of the West would require extinguishment of the tribal title to these lands, and the opening of large areas to settlement and occupation by the whites, even though individual Indian allotments should be made as was contemplated in some measure by the language of the former treaties with these tribes or nations. In that common understanding and under such existing conditions of experience and practice, this grant was made, and by these considerations, we submit, the interpretation of the grant should be controlled.

FOURTH.

The grant was a grant in praesenti. Every condition of the grant was complied with by the railroad company and, upon the extinguishment of the Indian title, the lands became a part of the public land of the United States, and the Government, by breaching the grant, elected to respond in damages.

Coming now to consider its language, section 9 provides:

> "That the same grants of land through the Indian Territory ARE HEREBY MADE as provided in the first section of this act, whenever the Indian title shall be extinguished by treaty or otherwise, not to exceed the ratio per mile granted in the first section of this act: *Provided*, that said lands become a part of the public lands of the United States."

And section 11 of the same act grants to the *one* road of the *three* then chartered by Kansas, to build to the south boundary thereof, which should first reach in construction the common designated point on the

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north boundary of the Indian Territory, the right to construct through the Indian Territory, and "WITH GRANTS OF LAND ACCORDING TO THE PROVISIONS OF THIS ACT."

It is plain

(1) That the *right-of-way* was granted. That right was of instant effect, without condition. The *power* to so grant was undoubted, and has been so judicially determined. *L. L. & G. R. R. Co. v. U. S.*, 92 U. S. 733; *Missouri, Kansas & Texas Ry. Co. v. Roberts*, 152 U. S. 114, cited, *supra*.

(2) That the words "*are hereby granted*" in both meaning and plain legal effect create a *present* interest. So rule all the cases. They operate to convey the *present* interest of the United States. When the Indian title should be extinguished as the section provides the then possession of the Indians "attaches itself to the fee without further grant". *Johnson v. McIntosh*, 8 Wheat. 543; *Beecher v. Wetherby*, 95 U. S. 517, 526, cited, *supra*.

(3) The present interest of the United States was the ultimate fee title. That passed *cum onere*, that is to say such title was burdened with the Indian right of occupancy and such burden continued until in the language of the grant "the Indian title shall be extinguished by treaty or otherwise."

(4) This language implied the clear understanding and purpose of Congress (following the practice and precedents from the earliest days of colonial settlement) that such Indian title would be extinguished—the time when that should occur being of course subject to the control of Congress, as in all other cases. But assuming good faith on the part of Congress this

language found in an act of its own framing necessarily implied the understanding and concurrent obligation that such title would be extinguished "by treaty or otherwise" and that the Government would not thereafter so change conditions as to make the extinguishment impossible. It was accepted by the grantee —this appellant— in that understanding. No other was possible. To *deny* it *now*—nearly fifty years after its enactment—would be to close discussion and the temple of justice as well. The Indian title as it then stood and was then understood—namely, the tribal or common title which in the way of "Indian title" was *all* which then existed had the certainty of future extinguishment. The civilization of the white man had forced it in all previous times since Plymouth and Jamestown. It was as certain as the progress of time. The United States has admittedly extinguished that title of these Indians—not by treaty, but "otherwise", namely, by the strong arm of legislation and by the controlling force of that same relentless march of white civilization. But in the Act of 1866, its future extinguishment *in fact* was assumed, and our grant made on that assumption for the language thereof is "by treaty *or otherwise*"—prophetic language, but all-embracing in effect, and *then* so intended.

(5) The final proviso of the grant: "*Provided, that* said lands become a part of the public lands of the United States", is a rule controlling against us in the decision of the court below. Cases are therein cited which rule the technical definition of that term as meaning only lands subject to sale and settlement under general laws. We meet that contention with detailed discussion in this argument. We submit here, however, that in no conceivable construction of

these words can they operate to defeat our grant if the grantor after our acceptance of the grant and construction of the road thereunder so purposely acts and legislates as to *prevent* the lands becoming public in the sense (or in any sense) which would preclude that result. We do not attack the good faith of the Government. Public policy, it may well be assumed, required the United States to proceed by express legislation, and by executive action in accordance with such legislation, in such manner as to deliberately convey to individual allottees that title of its own in these lands, which in and by the Act of 1866, *supra*, it had granted or contracted to grant to us. If, as we contend, the Government granted to us, or contracted to grant to us, its title encumbered in enjoyment by the Indian possession or title until "the Indian title shall be extinguished by treaty or otherwise", our right to compensation for our interest in these lands stands beyond lawful denial. That is the crux of this case. No extended argument is necessary to convince this Court that if we took *present* interest in this land—however long deferred our actual enjoyment of possession may be—our grantor, the United States, could not *extinguish our title cotemporaneously with the acknowledged and rightful extinguishment of the Indian title*, and appropriate our title and grant it to another without creating in us the right of compensation for such taking, and the concurrent obligation of the United States to pay us that compensation. There is nothing in the grant to us or the 1866 Indian treaties which in any way supports the opinion of the Court of Claims of any such reserved right or power on the part of the Government. The Government had the right to postpone the extinguishment of the Indian title as long

as it pleased, but it was contemplated that at some time it was certain to be extinguished as it actually was. This was the tradition and history. Nothing else was in contemplation. The Court of Claims so found. On the contrary it was never contemplated that the railroad company's title *should ever be extinguished*—by granting it to the Indians in severalty or otherwise. While the Indian *title* was sacred, still it was only the right to *hold in common* as this Court has repeatedly decided.

When our grant was made the United States held and owned the ultimate fee. That is undoubted. By Act of Congress—the law of the land—it was granted to us. By that act, to again quote its language (Sec. 9), "the same grants of land through the Indian Territory *are hereby made*", and by section 11, the road first reaching in Kansas the Indian Territory line "shall be authorized * * * to construct and operate" its road across that Territory, and "*with grants of land according to the provisions of this act.*"

It is urged in the decision of the Court of Claims that the language of the granting section (9), *i. e.*, "as provided in the first section of this act", operates in effect to defeat the entire grant in the Indian Territory, because by section one all lands "reserved" are excluded from its operation unless indeed the indemnity provision applies. But reading the grant by its clear expression and intent, it is plain such construction is impossible. All lands in the Indian Territory through which the grant extended were in authorized Indian occupation—all were embraced in the then existing "Indian title." That was well understood and the specific language of section 9 in recognizing and dealing with that situation in express terms

negatives the contention that they were intended to be so limited. It is plain that the reference to section one was not intended to include the provision as to "reserved" lands as found therein. Such construction is impossible, for it would plainly defeat the whole grant in the Indian Territory, and compel the conclusion that Congress both gave and took away the grant by the language used in section 9. The exception would be as large as the grant—hence, the exception and not the grant must fall.

This suit is to recover the value of the granted lands within the place limits of the grant. The area of the grant is, by reference in Section 9, determined by Section 1 thereof, but the grant itself is determined by Section 9. None of the lands were disposed of or in any way incumbered between the date of the grant and that of the definite location and final construction of the road. The lands were in no way reserved by the proviso in Section 1, because the grant by Section 9 was absolute. The lands in the Indian Territory were not reserved by Section 1 of the grant, but were expressly granted by Section 9. The authorities are uniform that grants of the lands within the place limits take effect from the date of the grants on the performance of the conditions. When the road was located and built, the grant attached to the area of twenty miles on each side of the road, but was still in the nature of a float until the lands were surveyed, and then specifically attached to the odd numbered sections within the twenty mile limits on each side of the road. By the doctrine of relation, which is established by all of the authorities on land grants, when the road was located and built and surveyed, the title acquired by the grant became specific and related back to the

date of the grant. The extinguishment of the Indian title made the lands part of the public lands of the United States. Every condition of the grant has been complied with. The Government, though, has breached the grant by not complying with it, by appropriating and diverting the granted lands to other uses.

Van Wyck v. Knevels, 106 U. S. 360;
Grinnell v. R. R., 103 U. S. 739;
Wood v. R. R., 104 U. S. 329;
Kan. P. Ry. v. Ry., 112 U. S. 414;
Buttz v. North. Pac., 119 U. S. 55;
Glasgow v. Hortiz, 1 Black. 595;
Lessieur v. Price, 12 How. 59;
Thrasher v. O'Connor, 115 U. S. 102;
Ry. v. Ry., 109 U. S. 329;
Barney v. Ry., 117 U. S. 228;
Schulenberg v. Harriman, 21 Wall. 44;
Cedar Rap. Ry. v. Courtright, 21 Wall. 310;
Deseret Salt Co. v. Tarpey, 142 U. S. 241;
R. R. v. R. R., 139 U. S. 1;
3 *Fed. Rep. Dig.*, Col. 7650;
L. L. & G. R. R. Co. v. United States, 92 U. S. 733;
M. K. & T. Ry. Co. v. Kan. Pac. Ry. Co., 97 U. S. 491;
Wisconsin R. R. v. Price County, 133 U. S. 496;
St. Paul, Etc., R. R. v. Winona R. R., 112 U. S. 720;
St. P. Minn. & Manitoba R. R. v. Phelps, 137 U. S. 528.

In *Wisconsin Railroad Co. v. Price County*, 133 U. S. 496, Mr. Justice Field, who, perhaps, wrote the opinions in more land grant cases than any other justice, had occasion to examine all of the land grants from 1860 to 1880, and, as a result of that examination, he

states that in all of them there was a present definite grant of lands within the place limits and an indemnity grant out-side of the place limits, and that in all the acts referred to, as to the lands within the place limits "the title conferred was a present one, so as to insure the donation and the construction of the road proposed against any revocation by Congress, except by non-performance of the work within the period designated."

We quote from only a few other cases herein cited, for the reason that they are all to the effect as stated by Justice Field.

In *St. Paul & Pacific R. R. Co. v. Northern Pacific Ry. Co.*, 139 U. S. 1, where the grant was in words, "there be and hereby is granted," it was again held that these words imported a "transfer of a present title, not a promise to transfer one in the future". The Court said (p. 7):

> "The construction we give to the granting terms of the act, as qualified by subsequent provisions, not only secures the application of the property to the construction of the road, and telegraph line and thus carries out the purposes of the Government, but also secures the company against any attempted alienation of the land to other parties."

The doctrine of relation is perhaps nowhere better stated than in *Van Wyck v. Knevels*, 106 U. S. 360, where a grant in similar words was held to be a grant *in praesenti*, the Court saying (p. 365):

> "When that route is thus established the grant takes effect on the sections by relation as of the date of the Act of Congress. In that sense, we say the grant is one *in praesenti*. It cuts off all claims, other than those mentioned, to any portion

of the lands, from the date of the act, and passes the title as fully as though the sections had then been capable of identification."

Again, in *Barney v. Winona & St. Peter R. R.*, 117 U. S. 228, the doctrine of relation is thus stated (p. 232):

"In the construction of land grant acts in aid of railroads, there is a well established distinction observed between 'granted lands' and 'indemnity lands'. The former are those falling within the limits specially designated, and the title to which attaches when the lands are located by an approved and accepted survey of the line of the road filed in the Land Department, as of the date of the Act of Congress."

Again, in *M. K. & T. Ry. Co. v. Kansas & Pacific Ry. Co.*, 97 U. S. 491, it is said (pp. 496, 497):

"It is true that the route of the road in this case, as in those cases, to aid in the construction of which the act was passed, was to be afterwards designated; and until designated, the title could not attach to any specific tracts. The grant was of sections to be afterwards located and their location depended upon the route to be established; when that was settled, the location became certain, and the title that was previously imperfect acquired precision and attached to the lands."

In *St. Paul & Pac. R. R. Co. v. Northern Pacific R. R.*, 139 U. S. 1, 5, the Court said:

"The language of the statute is 'that there be, and hereby is, granted' to the company every alternate section of the lands designated, which implies that the property itself is passed, not any special or limited interest in it. The words also

import a transfer of a present title, not a promise to transfer one in the future.

"The route not being at the time determined, the grant was in the nature of a float, and the title did not attach to any specific sections until they were capable of identification; but when once identified the title attached to them as of the date of the grant."

In *St. Paul, Minnesota & Manitoba Ry. Co. v. Phelps*, 137 U. S. 528, there was a grant of lands in words, "there be and is hereby granted" and it was held that this operated as a grant *in praesenti* by relation as of the date of the grant. By the sixth section of the act it was provided, however,

"that in case any lands on the line of said road or branches are within any Indian territory, no title to the same shall accrue, nor shall the same be entered upon by authority of said territory, until the Indian title to the same shall have been extinguished."

It was held by the Court that under this section the right to the lands (p. 542)

"within the Indian country was made somewhat in the nature of a float, to become vested when the Indian title was extinguished. When the road was definitely located and the Indian title was extinguished, the land passed to the State for the benefit of the road."

FIFTH.

The Government's contention that the Land Grant could not operate as a grant in praesenti, because the lands were not surveyed at the time of the location and construction of the road, is without foundation and unsupported by any of the authorities. Indeed, the Court of Claims so ruled.

It was urged against us in the court below that the land grant in question could not operate by relation from the date of the grant unless the lands were surveyed at the time of the location and construction of the road. The contention is without foundation and is absolutely unsupported by any of the authorities. The authorities are all to the effect that the grant passes title from the date of the act, and becomes specific as to the granted sections whenever the land is surveyed, although the survey may be made after the location and construction of the road. The Government owned the fee to the lands at the date of the grant and could and did grant same, and could and did survey the lands.

Beecher v. Wetherby, 95 U. S. 517;
Cooper v. Roberts, 18 How. 173;
Buttz v. Northern Pacific R. R., 119 U. S. 55;
Rutherford v. Greene's Heirs, 2 Wheat. 196;
Lessieur v. Price, 12 How. 59;
Schulenberg v. Harriman, 21 Wall. 44;
United States v. Southern Pacific R. R., 146 U. S. 570;
Roberts v. M. K. & T. Ry. Co., 152 U. S. 114;
L. L. & G. R. R. v. United States, 92 U. S. 733.

In *Beecher v. Wetherby*, 95 U. S. 517, there was in controversy a grant of lands to Wisconsin under the Enabling Act by which Wisconsin Territory was ad-

mitted to the Union. The Enabling Act was dated August 6th, 1846. It provided that the section numbered sixteen in every township of the public lands in said State should be granted to said State for the use of the schools. At the date of the Enabling Act the land in question had not been surveyed. There was a contest between a party claiming direct from the United States under a patent and another party claiming under a patent from the State of Wisconsin. It was claimed by the party claiming under the patent direct from the United States, that the grant to Wisconsin was in the nature of an executory contract,

> "and by its terms no title to sections numbered sixteen could vest in the State until they were surveyed and designated on the plats filed in the Surveyor General's office" (p. 519),

and it was further claimed that

> "Not having then been surveyed, no right of the State to sections sixteen within the reservation vested and they have never since become 'public lands'" (p. 520).

The Court held, however, that it was immaterial that the lands had not been surveyed, that

> "All that afterwards remained for the United States to do with respect to them, and all that could be legally done under the compact, was to identify the sections by appropriate surveys" (p. 524).

In *Cooper v. Roberts*, 18 How. 173, where there was a similar grant to the State of Michigan, it was held that at the time of the grant it was immaterial that the lands had not been surveyed, it being held that the State by the grant acquired such an interest in every

section sixteen that her title became perfect as soon as the section in any township was designated by the survey.

And that,

> "until the survey of the township and the designation of the specific section, the right of the State rests in compact binding, it is true, the public faith, and dependent for execution upon the political authorities. Courts of justice have no authority to mark out and define the land which shall be subject to the grant. But when the political authorities have performed this duty, the compact has an object upon which it can attach, and if there is no legal impediment the title of the State becomes a legal title" (p. 179).

In *Buttz v. Northern Pacific R. R.*, 119 U. S. 55, the grant was held to be a grant *in praesenti*, although at the time of the grant, and for many years thereafter, the land was not surveyed, and at the time of the act was in the occupation of the Indian tribes.

In *Rutherford v. Greene's Heirs*, 2 Wheat. 196, there was a grant of 25,000 acres of land to General Greene and his heirs within the limits of a certain tract of land reserved for the use of the army. Although the particular 25,000 acres was not identified at the time of the grant, it was held to be a present grant and that (p. 199):

> "The general gift of 25,000 acres lying in the territory reserved for the officers and soldiers of the line of North Carolina had now become a particular gift of the 25,000 acres contained in this survey."

and that the granting act

> "vested a title in General Greene to 25,000 acres of

> land, to be laid off within the bounds allotted to the officers and soldiers, and that the survey made in pursuance of that act, and returned in March, 1783, gave precision to the title, and attached it to the land surveyed" (p. 205).

In the case of *Lessieur v. Price*, 12 How. 59, there was a grant of "four entire sections of land" to the State of Missouri for the seat of government. The grant was in words, "the same are hereby granted" and the act provided that the four sections should be located

> "as nearly as may be in one body at any time in such townships and ranges as the Legislature aforesaid may select" (p. 75).

This was held to be a present grant, and that upon the selection of the lands the grant attached to the lands selected.

In *Schulenberg v. Harriman*, 21 Wall. 44, where an attempt was made to apply the technical rules of the common law to a grant of lands, and to establish a mere promise of a grant instead of a grant *in praesenti*, for the reason that the lands were not identified or were incapable of identification at the time of the grant, it was said (p. 62):

> "The rules applicable to private transactions, which regard grants of future application—of lands to be afterwards designated—as mere contracts to convey and not as actual conveyances, are founded upon the common law, which requires the possibility of present identification of property to the validity of its transfer. A legislative grant operates as a law as well as a transfer of the property, and has such force as the intent of the Legislature requires."

In *United States v. Southern Pacific R. R.*, 146 U. S. 570, where the same point as in the case last reviewed was made, it was said (pp. 594, 598):

> "It would be a waste of time to attempt a re-examination of the questions or a re-statement of the reasons which have established these as the settled rules of law in respect to land grants, and made it so that the old common law rule as to the necessity of identification to a conveyance has not been controlling in determining the scope and effect of a congressional land grant. * * * To the validity of such transfers (private transfers by deed) it may be admitted that there must exist a present power of identification of the land, and that where no such power exists instruments with words of present grant are operative, if at all, only as contracts to convey but the rules of the common law must yield in this, as in all other cases, to the legislative will."

In *L. L. & G. R. R. Co. v. United States*, 92 U. S. 733, it was held that the words,

> "there be and is hereby granted,"

import a present transfer of title,

> "though a survey of the lands and the location of the road are necessary to give precision to it and attach it to any particular tract" (p. 741).

SIXTH.

The grant in question was of "lands through the Indian Territory." The grant of the right of way through the Indian Territory was a grant of the same nature and in practically the same terms as the grant of the lands.

The grant of the right of way to the railroad com-

pany through the Indian Territory is found in section 8, and the description thereof in section 6, and was a grant of the same nature, and in practically the same terms, as the grant of the lands within the twenty-mile limits. The right-of-way grant became effective as from the date of the grant, when the road was located and built. It has always been respected, was reserved from allotment, and the railroad company is now enjoying it. The terms of the grant of the lands within the twenty-mile limits are in the present tense, the same as the grant of the right-of-way. The words in both grants are "there are" or "is hereby granted".

In the Indian Territory, before and at the time of the grant the Indians had covenanted by treaties to a grant of the right-of-way through the Territory (Pet. 19-20).

As to the Indian lands in Kansas, grants of the right-of-way were made without the consent of the Indians and upheld in

L. L. & G. R. R. Co. v. United States, 92 U. S. 733;

Roberts v. M. K. & T. Ry. Co., 152 U. S. 114.

The Act of July 26, 1866, made an absolute grant of right-of-way through the Indian Territory *without the consent* of the Indians and against the provisions of the 1866 Indian treaties.

SEVENTH.

The lands in question have been surveyed, as other public lands.

There is no foundation in the record for the claim of defendant's counsel that the lands in question were not surveyed as public lands. The petition alleges spe-

cifically that they were surveyed by the United States, under general laws of the United States, joined to the public surveys and treated, so far as the survey is concerned, exactly like other public lands (Pet., p. 32).

By Section 15 of the Act of Congress of March 3, 1893, the Dawes Commission was authorized and directed to have all of the lands surveyed (Pet., p. 37).

The Act of Congress of June 10, 1896 (Pet., p. 39), provides for the public survey of all of the lands in the Indian Territory, under the general provisions of law then in force relating to surveys of the public lands and the petition specifically alleges that the lands in the Indian Territory have been surveyed as other public lands of the United States, and at its expense. The Act of June 10, 1896, shows the appropriation of money for surveying the lands in question, and that they should be made under the direction of the Director of the Geological Survey, by such persons as may be employed by or under him for that purpose; and provides further that such surveys shall be executed under instructions to be issued by the Secretary of the Interior, and subdivisional surveys issued under the rectangular system, as now provided by law, which meant public surveys. When the survey was made it was to be approved by the Director of the Geological Survey, and two copies thereof were to be returned, one for filing in the Indian Office and one in the General Land Office, and such surveys, field notes and plats should have the same legal force and effect as heretofore given to the acts of surveyors general. And the act goes on to say that "hereafter, in the public land surveys of the Indian Territory, iron or stone posts shall be erected at each township corner, upon which shall be recorded the usual marks required to

be placed on township corners by the laws and regulations governing public surveys". On page 42 of the Petition it is alleged that the Dawes Commission was to complete the surveys. (See also Petition, pp. 42, 48, 66 and 67.)

Counsel for the Government have insisted in all of their briefs that at the time of the grant to the railroad company no power existed in the United States to survey the lands in the Indian Territory; and for that reason they further claim that there *was no power to make a grant in praesenti.* Section 2115, Revised Statutes of the United States, *which was in force at the time of the grant, expressly and specifically authorized the survey of the Indian lands in the same manner as other public lands of the United States.* This statute specifically declares that Indian lands are public lands of the United States.

Section 2115, Revised Statutes of United States, provides that:

> "Whenever it becomes necessary to survey any Indian or other reservations, or any lands, the same shall be surveyed under the direction and control of the General Land Office, and as nearly as may be in conformity to the rules and regulations under which *other public lands* are surveyed."

This act was passed in 1864. (See 13 Stat. L., page 41.)

The Court of Claims expressly held:

> "It did not require a public survey to make them (Indian lands) public lands and upon the extinguishment of the Indian title if within the intent of the act they would have passed under the

grant, for the railroad had long since definitely located its line of road."

EIGHTH.

The grant in question constituted a contract between the United States and the Railroad Company, whether considered a grant in praesenti, or a grant in futuro.

The grant in question constituted a contract between the United States and the Railroad Company, whether construed as a grant *in praesenti* or as a grant *in futuro*—whether it took effect as from the date of the grant or from the date of the extinguishment of the Indian title. When the Railroad Company accepted the grant and built its road, doing everything that was required to be done by it, it became an executed contract and the Railroad Company acquired a vested interest, of which it could not be deprived without a transparent breach of the contract.

Calder v. Bull, 3 Dal. 386;
Fletcher v. Peck, 6 Cranch. 87;
Terrett v. Taylor, 9 Cranch. 43;
Green v. Biddle, 8 Wheat. 1;
McGee v. Mathis, 4 Wall. 143;
Wilson v. Wall, 6 Wall. 83;
Frisbie v. Whitney, 9 Wall. 187;
Davis v. Gray, 16 Wall. 203;
Beecher v. Wetherby, 95 U. S. 517;
Wirth v. Branson, 98 U. S. 118;
Sinking Fund Cases, 99 U. S. 700;
Campbell v. Wade, 132 U. S. 37;
Geo. F. Embden v. Lincoln Land Co. et al., 184 U. S. 660;
H. & T. C. Ry. Co. v. Texas, 170 U. S. 243;
Fifth Amendment to Federal Constitution;
United States v. Lynah, 188 U. S. 445.

In *Calder v. Bull*, 3 Dal. 386, it was held that an Act of the Legislature, contrary to the first great principles of the social compact cannot be considered a rightful exercise of legislative authority, and that such an act would be a law that impaired the lawful contracts of citizens.

In *Fletcher v. Peck*, 6 Cranch. 87, the Supreme Court, in an opinion by Chief Justice Marshall, held that a grant is an executed contract and implies on the part of the grantor a contract not to reassert the title granted. Among other things the Court said (pp. 136-139:)

> "A contract is a compact between two or more parties and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do a particular thing; such was the law under which the conveyance was made by the Governor. A contract executed is one in which the object of contract is performed; and this, says Blackstone, differs in nothing from a grant. The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant.
>
> "Since, then, in fact, a grant is a contract executed, the obligation of which still continues, and since the Constitution uses the general term contract, without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the latter as well as the former. A law annulling conveyances between individuals, and declaring that the grant-

ors should stand seized of their former estates, notwithstanding those grants, would be as repugnant to the Constitution as a law discharging the vendors of property from the obligation of executing their contracts by conveyances. It would be strange if a contract to convey was secured by the Constitution, while an absolute conveyance remained unprotected.

"If, under a fair construction of the Constitution, grants are comprehended under the term contracts, is a grant from the State excluded from the operation of the provision? Is the clause to be considered as inhibiting the State from impairing the obligation of contracts between two individuals, but as excluding from that inhibition contracts made with itself? * * *

"It is, then, the unanimous opinion of the Court, that, in this case, the estate having passed into the hands of a purchaser for a valuable consideration, without notice, the State of Georgia was restrained, either by general principles which are common to our free institutions, or by the particular provisions of the Constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void."

The Court further said (p. 132):

"The Legislature of Georgia was a party to this transaction, and for a party to pronounce its own deed invalid, whatever cause may be assigned for its invalidity, must be considered as a mere act of power which must find its vindication in a train of reasoning not often heard in courts of justice."

In *Terrett v. Taylor*, 9 Cranch. 43, it is held that a

legislative grant is irrevocable by the Legislature. In that case Mr. Justice Story said (pp. 50-51):

> "If the Legislature possessed the authority to make such a grant and confirmation, it is very clear, to our minds, that it vested an indefeasible and irrevocable title. We have no knowledge of any authority or principle which could support the doctrine that a legislative grant is revocable in its own nature, and held only *durante bene placito*. Such a doctrine would uproot the very foundations of almost all the land titles in Virginia, and is utterly inconsistent with a great and fundamental principle of a republican government, the right of the citizens to the free enjoyment of their property legally acquired."

In *Green v. Biddle*, 8 Wheat. 1, 92-93, it was said:

> "A slight effort to prove that a compact between two States is not a case within the meaning of the Constitution, which speaks of contracts, was made by the counsel for the tenant, but was not much pressed. If we attend to the definition of a contract, which is the agreement of two or more parties, to do or not to do certain acts, it must be obvious that the propositions offered, and agreed to by Virginia, being accepted and ratified by Kentucky, is a contract. In fact, the terms 'compact' and 'contract' are synonymous, and in Fletcher v. Peck, the Chief Justice defines a contract to be a compact between two or more parties: The principles laid down in that case are, that the Constitution of the United States embraces all contracts, executed or executory, whether between individuals or between a State and individuals; and that a State has no more power to impair an obligation into which she herself has entered, than she can the contracts of in-

dividuals. Kentucky, therefore, being a party to the compact which guaranteed to claimants of land lying in that State, under titles derived from Virginia, their rights, as they existed under the laws of Virginia, was incompetent to violate that contract by passing any law which rendered those rights less valid and secure."

In *McGee v. Mathis*, 4 Wall. 143, 155, it was said:

"It is not doubted that the grant by the United States to the State upon conditions, and the acceptance of the grant by the State, constituted a contract. All the elements of a contract met in the transaction—competent parties, proper subject-matter, sufficient consideration, and consent of minds. This contract was binding upon the State, and could not be violated by its legislation without infringement of the Constitution."

In *Wilson v. Wall*, 6 Wall. 83, 89-90, it is said:

"Now, while it is freely conceded that this construction given to the treaty should form a rule for the subsequent conduct of the department, it cannot affect titles before given by the Government, nor does it pretend to do so. Congress has no constitutional power to settle the rights under treaties except in cases purely political. The construction of them is the peculiar province of the judiciary, when a case shall arise between individuals. The Legislature may prescribe to the executive how any mere administrative act shall be performed, and such was the only aim and purpose of this act.

"In the Cherokee treaty, where a grant of 640 acres was given to persons 'willing to become citizens' a life estate only was given to the settler, with *reversion to his children*. This treaty makes no such provision for children. The construction

given by the representatives of both parties to the treaty and the grants issued under it, were not revoked, nor could they be, by mere legislative act, founded on a different construction of a doubtful article of the treaty."

In *Frisbie v. Whitney*, 9 Wall. 187, it was said (Syllabus):

"The power of Congress over the public lands, as conferred by the Constitution, can only be restrained by the courts, in cases where the land has ceased to be Government property by reason of a right vested in some person or corporation.

"Such a vested right, under the pre-emption laws, is only obtained when the purchase money has been paid, and the receipt of the proper land officer given to the purchaser.

"Until this is done, it is within the legal and constitutional competency of Congress to withdraw the land from entry or sale, though this may defeat the imperfect right of the settler."

In *Beecher v. Wetherby*, 95 U. S. 517, 523-524, the Court said:

"It matters not whether the words of the compact be considered as merely promissory on the part of the United States, and constituting only a pledge of a grant in future, or as operating to transfer the title to the State upon her acceptance of the propositions as soon as the sections could be afterwards identified by the public surveys. In either case, the lands which might be embraced within those sections were appropriated to the State. They were withdrawn from any other disposition, and set apart from the public domain, so that no subsequent law authorizing a sale of it could be construed to embrace them, although they were not specially excepted. All that after-

> wards remained for the United States to do with respect to them, and all that could be legally done under the compact was to identify the sections by appropriate surveys; or, if any further assurance of title was required, to provide for the execution of proper instruments to transfer the naked fee, or to adopt such further legislation as would accomplish that result. They could not be diverted from their appropriation to the State."

In *Davis v. Gray*, 16 Wall. 203, there was a grant of land by the State of Texas to a railroad company. The railroad company accepted the grant and entered upon the performance of the conditions imposed upon it. Intervening the commencement of the work and the completion thereof, however, the War of the Rebellion, in which the State of Texas participated, ensued, and by the State's own action it became impossible for the railroad company to complete the work within the time specified. The Court held,

> "that the land grants here in question were contracts is too well settled in this court to require discussion. As such, they were within the protection of that clause of the Constitution of the United States which declares that no State shall pass any law impairing the obligations of contracts. The ordinance of 1869, and the Constitution adopted in that year, in so far as they concern the question under consideration, are nullities, and may be laid out of view. When a State becomes a party to a contract, as in the case before us, the same rules of law are applied to her as to private persons under like circumstances" (p. 232).

The Court, upon the question of the State's preventing the completion of the road, said (p. 230):

"Here the controlling consideration is, that the performance of all the conditions not performed was prevented by the State herself. By plunging into the war, and prosecuting it, she confessedly rendered it impossible for the company to fulfil during its continuance. This is alleged in the bill, and admitted by the demurrer.

"The rule at law is, that if a condition subsequent be possible at the time of making it, and becomes afterwards impossible to be complied with, by the act of God, or the law, or the grantor, the estate having once vested is not thereby divested, but becomes absolute."

The 1869 Constitution of Texas undertook to annul all land grants as to lands which had not been actually acquired by the railroad companies and alienated. The section of the 1869 Constitution read (p. 226):

"All lands granted to the railroad companies which have not been alienated by said companies in conformity with the terms of their charters respectively and the laws of the State under which the grants were made, are hereby declared forfeited to the State for the benefit of the school fund."

In *Wirth v. Branson*, 98 U. S. 118, 121, it was held that where a party has complied with all the terms and conditions which entitled him to a patent to a particular tract of public land, he "acquired a vested interest therein," and that "the public faith has become pledged to him, and any subsequent grant of the same land to another party is void."

Sinking Fund Cases, 99 U. S. 700, decided in 1873.

By Act of Congress of July 1st, 1862, the Union Pacific Railroad Company was incorporated and a grant of public lands to the amount of ten alternate sections per mile on each side was made. In addition, there was a bonus given the company in the form of United States bonds to the amount of $16,000 per mile. The act provided that all compensation for services rendered to the Government should be applied to the payment of the bonus bonds and the interest, until the whole amount was fully paid. By act of Congress of 1864, it was provided that only one-half of the amounts of compensation for services rendered to the Government, should be applicable to the bonds. The 1862 act further provided that the company, after the completion of its road, and until the bonus bonds and interest were paid, should apply at least 5 per cent of its net earnings to the payment of said bonds and interest. By the Sinking Fund Act of 1868, it was provided that the whole amount of compensation to be received from the Government should be retained by the Government, one-half thereof to be presently applied to the liquidation of the interest paid, and to be paid, by the Government upon the bonus bonds, and the other half thereof to be turned into a sinking fund, to be applied to the payment of the bonus bonds when they should fall due. The act provided that there should be paid by the company into the sinking fund, 25 per centum of its net earnings.

One of the sinking fund cases was that of the *Union Pacific R. R. Co. v. United States*, in the Court of Claims, and the other was the suit of a stockholder, *Gallatin v. R. R. Co.*, in the United States Court of the District of California. The Court of Claims dismissed the company's petition and the company appealed.

In the Stockholder's case, the railroad company filed a demurrer which was overruled, and on its declining to answer, the Court passed a decree in conformity with the prayer of the bill. In both cases, the sinking fund act was attacked as being unconstitutional, impairing the obligation of contracts, and the company's franchises. The Court held, in the opinion by Chief Justice Waite, that the sinking fund act was constitutional by reason of the fact that Congress reserved in the act creating the Union Pacific, the right to amend, repeal or alter its charter, and that, therefore, the act was not unconstitutional and did not impair the obligation of contract. The legislation was upheld for the reason that the railway company was yearly declaring dividends and was not setting aside any funds for the ultimate payment of its obligations, including the Government bonus bonds. Among other things, Chief Justice Waite said (pp. 718-721):

> "The United States cannot any more than a State, interfere with private rights, except for legitimate governmental purposes. They are not included within the constitutional prohibition which prevents States from passing laws impairing the obligation of contracts, but equally with the States they are prohibited from depriving persons or corporations of property without due process of law. They cannot legislate back to themselves without making compensation, the lands they have given this corporation to aid in the construction of its railroad. Neither can they by legislation compel the corporation to discharge its obligations in respect to the subsidy bonds otherwise than according to the terms of the contract already made in that connection. The United States are as much bound by their contracts as are individuals. If they repudiate their

obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen. No change can be made in the title created by the grant of the lands, or in the contract for the subsidy bonds, without the consent of the corporation. All this is indisputable.

* * * * * * * *

"Taking both acts together and giving the explanatory statement in that of 1862, all the effect it can be entitled to we are of the opinion that Congress not only retains, but has given special notice of its intention to retain, full and complete power to make such alterations and amendments of the charter as come within the just scope of legislative power. That this power has a limit, no one can doubt. All agree that it cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made; but as was said by this Court, through Mr. Justice Clifford, in Miller v. The State (15 Wall. 498), 'it may be safely affirmed that the reserved power may be exercised and to almost any extent, to carry into effect the original purposes of the grant, or to secure the due administration of its affairs, so as to protect the rights of stockholders and of creditors, and for the proper disposition of its assets;' and again, in Holyoke Company v. Lyman (*Id.* 519), 'to protect the rights of the public and of the corporators, or to promote the due administration of the affairs of the corporation.' Mr. Justice Field, also speaking for the Court, was even more explicit when, in Tomlinson v. Jessup (*Id.* 459), he said, 'the reservation affects the entire relation between the State and the corpora-

> tion, and places under legislative control all rights, privileges and immunities derived by its charter directly from the State;' and again, as late as Railroad Company v. Maine (96 U. S. 510), 'by the reservation * * * the State retained the power to alter it (the charter) in all particulars constituting the grant to the new company, formed under it, of corporate rights, privileges and immunities.' Mr. Justice Swayne, in Chields v. Ohio (95 U. S. 324), says by way of limitation, 'The alterations must be reasonable; they must be made in good faith, and be consistent with the object and scope of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration.' The rules as here laid down are fully sustained by authority. Further citations are unnecessary."

Justices Field, Strong and Bradley dissented, each writing a separate dissenting opinion. All of them held that the Sinking Fund Act did impair the obligation of the contract between the railroad company and the Government, and that the Government had no constitutional power to impair the obligations of that contract. Among other things, Mr. Justice Strong said (pp. 731, 733, 736-737, 738):

> "In my opinion, the Act of Congress of May 7, 1873, is plainly transgressive of legislative power. As was said by Mr. Hamilton in his celebrated communication to the Senate of Jan. 20, 1795, 'when a government enters into a contract with an individual, it deposes, as to the matter of the contract, its constitutional authority, and exchanges the character of legislator for that of a moral agent, with the same rights and obligations as an individual. Its promises may be justly considered as excepted out of its power to legislate,

unless in aid of them. It is in theory impossible to reconcile the idea of a promise which obliges, with a power to make a law which can vary the effect of it' (3 Hamilton's Works, 518-519). Opinions similar to this have often found expression in judicial decisions, even in those of this court. * * * There is no technicality about vested rights. Most of them grow out of contracts, and, no matter how they arise, they are all equally sacred, equally beyond the reach of legislative interference. A vested right of action is property in the same sense in which rights to tangible things are, and is equally protected. Whether it springs from contract or from other rules of the common law, it is not competent for the Legislature to take it away.

* * * * * * * *

"Now, where is the power of Congress to add new terms to any contract made with the United States, or made between any two private individuals? Where is the power to annul vested rights? It is certainly not to be found in the Constitution. True, the provision that no State shall pass any law impairing the obligation of contracts applies only to State legislation. For such legislation the prohibition was necessary; for State Legislatures have all legislative power which is not expressly denied to them. But no necessity existed for imposing such a limitation on the power of Congress. As Mr. Hamilton said in the eighty-fourth number of the Federalist, 'Why declare that things shall not be done which there is no power to do?' Congress has no power except such as has been expressly granted to it, or such as is necessary or proper for carrying into execution the powers specified, and those vested by the Constitution in the Government, or some department or officer thereof. I search in vain

for any express or implied grant of power to add new terms to any existing contracts made by or with the Government, or any grant of power to destroy vested rights. No power has been given to Congress to *lessen* the obligations of a contract between private parties by direct legislation, except by the enactment of uniform laws on the subject of bankruptcy. * * * What is property? What is the common understanding of the term? It is, in reference to its subject, whatever a person can possess and enjoy by right, and the person who has that right has the property. The subject may be corporeal or incorporeal. A right in action is as completely property as is a title to land. A very large portion of the property of the country consists in rights attendant upon contract.

* * * * * * * *

"I notice another consideration which, to my mind, is not without weight. It may, I think, well be doubted whether the act of 1873 is even an attempted exercise of legislative power. A statute undertaking to take the property of A and transfer it to B is not legislation. It would not be a law. It would be a decree or sentence, the right to declare which, if it exists at all, is in the judicial department of the Government. The act of Congress is little, if any, more. It does not purport to be a general law."

Mr. Justice Bradley, in his dissenting opinion, said (pp. 746-747):

"A contract is property. To destroy it wholly or to destroy it partially is to take it; and to do this by arbitrary legislative action is to do it without due process of law."

Mr. Justice Field, in his dissenting opinion, said (pp. 750, 759, 760):

"The decision will, in my opinion, tend to create insecurity in the title to corporate property in the country. It, in effect, determines that the general government, in its dealing with the Pacific Railroad Companies, is under no legal obligation to fulfill its contracts and that whether it shall do so is a question of policy and not of duty. * * * It could not, as justly observed by one of the counsel who argued this case, '*release itself and hold the other party* to the contract. It could not change its *obligation* and hold its *rights* unchanged. It cannot bind itself as a *civil corporation*, and loose itself by its sovereign legislative power.' This principle is aptly expressed by the great conservative statesman, Alexander Hamilton, in his report to Congress, on the public credit, in 1795. 'When a government,' he observes, 'enters into a contract with an individual, it deposes, as to the matter of the contract, its constitutional authority, and exchanges the character of legislator for that of a moral agent, with the same rights and obligations as an individual. Its promises may be justly considered out of its *power to legislate*, unless in aid of them. It is, in theory, impossible to reconcile the two ideas of a *promise which obliges* with a power *to make a law which can* vary the effect of it.' Hamilton's Works, vol. III, pp. 518, 519. * * *

"In the case of *The Commonwealth v. The Proprietors of New Bedford Bridge, a corporation of Massachusetts*, the Supreme Court of that State, speaking with reference to a contract between the parties, uses this language: 'Each has equal rights and privileges under it, and neither can interpret its terms authoritatively so as to control and bind the rights of the other. The Common-

wealth has no more authority to construe the charter than the corporation. By becoming a party to a contract with its citizens the government divests itself of its sovereignty in respect to the terms and conditions of the contract and its construction and interpretation, and stands in the same position as a private individual. If it were otherwise, the rights of parties contracting with the government would be held at the caprice of the sovereign, and exposed to all the risks arising from the corrupt or ill-judged use of misguided power. The interpretation and construction of contracts when drawn in question belong exclusively to the judicial department of the government. The Legislature has no more power to construe their own contracts with their citizens than those which individuals make with each other. They can do neither without exercising judicial powers which would be contrary to the elementary principles of our government, as set forth in the Declaration of Rights.' 2 Gray, 350."

In *Campbell v. Wade*, 132 U. S. 34, 37, 38, it was said:

"It was contended in the state courts, and the contention is renewed here, that the petitioner, by his application for a survey, had acquired a vested interest in the lands he desired to purchase, which could not be impaired by their subsequent withdrawal from sale. This position is clearly untenable. The application was only one of different steps, all of which were necessary to be performed before the applicant could acquire any right against the State. The application was to be followed by a survey, and the surveyor was allowed three months in which to make it. By the express terms of the act it was only after the return and filing in the General Land Office of the surveyor's

certificate, map and field-notes of the survey that the applicant acquired the right to purchase the land by paying the purchase money within sixty days thereafter. But for this declaration of the act, we might doubt whether a right to purchase could be considered as conferred by the mere survey so as to bind the State. Clearly, there was no such right in advance of the survey. The State was under no obligation to continue the law in force because of the application of any one to purchase. It entered into no such contract with the public. The application did not bind the applicant to proceed any further in the matter; nor, in the absence of other proceedings, could it bind the State to sell the lands.

"The adjudications are numerous where the withdrawal from sale by the government of lands previously opened to sale has been adjudged to put an end to proceedings instituted for their acquisition. Thus, under the pre-emption laws of the United States, large portions of the public domain are opened to settlement and sale, and parties having the requisite qualifications are allowed to acquire the title to tracts of a specific amount by occupation and improvement, and their entry at the appropriate land office and payment of the prescribed price. But it has always been held that occupation and improvement of the tracts desired, with a view to pre-emption, though absolutely essential for that purpose, do not confer upon the settler any right in the land occupied as against the United States, which could impair in any respect the power of Congress to withdraw the land from sale for the uses of the government, or to dispose of the same to other parties. This subject was fully considered in *Frisbie v. Whitney*, 9 Wall. 187, where this doctrine was announced. It was subsequently affirmed in the

Yosemite Valley Case, 15 Wall. 77, 87, where the Court said that until all the preliminary steps prescribed by law for the acquisition of the property were complied with, the settler did not obtain any title against the United States, and that among these were entry of the land at the appropriate land office and payment of its price. 'Until such payment and entry,' the Court said, 'the acts of Congress give to the settler only a privilege of pre-emption in case the lands are offered for sale in the usual manner; that is, the privilege to purchase them in that event in preference to others. The United States by those acts enter into no contract with the settler, and incur no obligation to anyone that the land occupied by him shall ever be put up for sale. They simply declare that in case any of their lands are thrown open for sale the privilege to purchase them in limited quantities, at fixed prices, shall be first given to parties who have settled upon and improved them.'

"In the present case, before the act withdrawing the lands from sale, which was equivalent to a repeal of the act authorizing the sale, could be held to impair any vested right of the applicant, he must have done everything required by law to secure such right. Until then no contract could arise in any way binding upon the State. No contract rights of the petitioner were therefore violated by its legislation.

"The law in this respect is very clearly stated in the opinion of the Commissioners of Appeals of Texas, adopted by the Supreme Court of that State."

In *Embleu v. Lincoln Land Company et al.*, 184 U. S. 660, 664, it is said:

"The bill before us is such a bill, and question

arises whether it was within the power of Congress to exercise control over the land, and direct, as it did, the issue of the patent to Weed; and that depends on whether Emblen had obtained a vested right in the land before the passage of the Act of December 29, 1894, as otherwise the power of Congress over its disposition as public land was plenary. *Frisbie v. Whitney*, 9 Wall. 187, 19 L. Ed. 920, 9 Sup. Ct. Rep. 509; *Gonzales v. French*, 164 U. S. 345, 41 L. Ed. 460, 17 Sup. Ct. Rep. 102.

"The Weed entry had not been canceled when the Act of 1894 took effect, so that Emblen had no right to make entry under the Act of May 14, 1880. The jurisdiction of the Land Department ceased with the issue of the patent, and the power of Congress to direct the patent to issue was unaffected by the possibility that Emblen, if he had been permitted to prosecute his contest, might have succeeded. As Mr. Justice Miller said in *Frisbie v. Whitney*, *supra*, the rights of a claimant are to be measured by the acts of Congress, and if they show 'that he acquired no vested interest in the land, then, as his rights are created by the statutes, they must be governed by their provisions, whether they be hard or lenient.'

"As Emblen never made an entry on the land, nor perfected a right to do so, it results that he had no vested right or interest which could defeat the operation of the Act of 1894."

In *Houston & Texas Central Ry. Co. v. Texas*, 170 U. S. 243, in which the State of Texas brought suit in the District Court to recover of the railway company sixteen sections of land located in Nolan County, Texas, it was alleged that the certificates were issued without authority of law and in violation of the Constitution of the State. By the Constitution of Texas

of 1869, it was provided that no grants of land should be made to railroad companies, but there had been a grant of land made to the Houston & Texas Central long prior to the adoption of the 1869 Constitution. The lands in question were upon the Austin Branch of the H. & T. C. and this Austin Branch was not completed until sometime after the adoption of the 1869 Constitution. For this reason, and for the reason, as decided by the State courts, that the Austin Branch was not contemplated or covered by the original grant of lands to the H. & T. C., it was held that the H. & T. C. was not entitled to the lands in question, but the Supreme Court of the United States held that the Austin Branch was contemplated by the original grant to the H. & T. C., and that while that branch was not completed until after the adoption of the 1869 Constitution, that the H. & T. C. acquired a vested right in the lands in question by having accepted its charter and entered upon the performance of constructing the line, and that the 1869 Constitution as construed and enforced by the State courts, was invalid and impaired the obligation of the original contract between the State and the H. & T. C. This decision was made notwithstanding part of the Austin Branch was not constructed by the H. & T. C., but acquired from another railroad company. The Court, among other things, said (p. 261):

> "In our opinion it results from the legislation and the facts that the company had the right to construct the line to Austin and earn sixteen sections per mile by so doing, prior to 1869; that by the acceptance of its charter and the subsequent legislation, and by the completion of an important part of its road before the adoption of the Con-

stitution of 1869, the company had acquired a vested right to the land grant; that the purchase of the Washington County road must be regarded as valid, and that thereby that road became part of the Austin line in operation as such before 1869; that the extension of the branch from Brenham to Austin cannot properly be treated as a new and independent line, and that there therefore was a contract between the State and the company in respect of the lands earned by the construction thereof."

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The United States, by rendering impossible a condition which was bound to occur in due course, and which both parties understood was certain to occur, and by disabling itself from carrying out and making effective its grant to the railroad company, and by allotting and selling the granted lands, violated the grant to the railroad company, and is concluded and estopped from making use of the proviso in section 9 of the grant, to defeat the claim of the railroad company, as no party to a contract can insist on the fulfillment of a condition, the happening or execution of which it renders impossible.

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of which it renders impossible. This is settled by all the authorities and is fundamental.

Williams v. Bank, 2 Peters 96;
Davis v. Gray, 16 Wall. 203;
Lovell v. Insurance Co., 111 U. S. 264;
Beach's Modern Law of Contract, Secs. 403-409;
Fleming v. Gilbert, 3 Johns (N. Y.) 527.

In Williams v. Bank of the United States, 2 Pet. 96, the Supreme Court said:

> "The principle here stated is not peculiar to this class of contracts. *If a party to a contract who is entitled to the benefit of a condition, upon the performance of which his responsibility is to arise, dispense with, or by any act of his own prevent the performance, the opposite party is excused from proving a strict compliance with the condition.*"

In Davis v. Gray, 16 Wall. 203, *it was held that where the State of Texas made a grant of land to a railroad company, and thereafter prevented the railroad company fro[m] completing the construction of the railroad within the time provided, that it could not take advantage of the failure of the railroad to perform by reason of the State's own act.*

In Lovell v. St. Louis Mutual Life Ins. Co., 111 U. S. 264, the Supreme Court said:

> "Where one party to an executory contract prevents the performance of it, *or puts it out of his own power to perform it, the other party may regard it as terminated and demand whatever damage he has sustained thereby.* We had occasion to examine this subject in the recent case of United States v. Behan, 110 U. S. 339, to which we refer. It is unnecessary to discuss it further here."

In Fleming v. Gilbert, 3 Johns (N. Y.) 527, it was said:

> "It is a sound principle that he who prevents a thing being done shall not avail himself of the non-performance he has occasioned."

This case is cited with approval and followed in U. S. v. Peck, 102 U. S. 64.

Counsel for the Government and the Court of Claims were wholly unable to point out any possible meaning for the phrase of section 9, "Provided, that said lands become a part of the public lands of the United States"; which would require that anything in addition to the extinguishment of the Indian title should occur before the grant was to take effect, and, in view of counsel's concession and the Court's holding that the Indian title had in fact been extinguished, it is plain that the two alleged conditions precedent required the same things, and that both have been fulfilled. As defined by Judge Thompson in his final argument in the Court of Claims, the words "public lands" as used in the proviso mean, precisely as we believe they mean, *lands over which the Government has complete power of disposition*. The petition plainly shows that nothing but the "Indian title" ever interfered with or placed the slightest restraint upon the Government's power of disposition over the lands in question. When this sole restraint was withdrawn, the power necessarily became complete and unrestricted, and the lands became "public lands". The same event fulfilled the requirements of both clauses. The grant thereupon took effect unconditionally, and it is therefore perhaps unnecessary for us to cite from the cases to the point as to what would have been the effect if either of the alleged conditions had not been performed.

The duration of the Indian title and the status of the lands were wholly within the control of the Government, and it never was or could have been in the power of the grantee to affect either in the slightest degree. The Court of Claims held it was *certain* that the Indian title at some time would be extinguished and that its extinguishment was contemplated by all parties and that what was done when it was extinguished was not contemplated. This Court has so held. Where a grant or promise is made dependent on acts of the promisor, or on events which the promisor can bring about or not at will, he cannot take the benefit of the consideration furnished by the grantee or promisee, and then by declining to do the act or by some other act making that which was certain to happen impossible of happening but for the intervening act which was never contemplated, nullify the grant or promise. The contract will be construed as containing a covenant by the grantor or promisor either to do the required act or at least not to do some act which makes it impossible for that which was expected to certainly happen. The extent and nature of the covenant which is to be implied depend upon all the surrounding circumstances, and particularly on the character of the consideration furnished by the grantee or promisee. Where the consideration is small, or where there is nothing to indicate that the parties expected that the required act or event would certainly be brought about, the obligation may extend no further than to refrain from taking affirmative action to prevent the fulfillment of the requirement. Where, as in the case at bar, the consideration is enormous, such as no sane contracting party would have given or expected in return for a grant not coupled with such an obligation, or for a

promise which could be repudiated at will, the contract must be so interpreted as to forbid any action which renders impossible the fulfillment of such conditions by the grantor or promisor. Particularly is this so where, as here, it is plain, from the previous history and surrounding circumstances, that both parties fully expected and intended such fulfillment, and regarded nothing as uncertain except the time of performance. Surely it is clear that in our case no reasonable legislature could have expected to get two hundred odd miles of railway built across a wilderness, and to have had the use of the road so built for a long time exclusively, and always on its own terms, in return for a grant or promise which might mean everything *or nothing* as the grantor might choose. Certainly no railroad company out of Bedlam would ever have made any such expenditure on any such mere possibility or hope. The Government's suggestion that the grant of the right-of-way was enough to reward the claimant and to account for its action without assuming that it believed it was in any event to get the main land grant was nothing less than absurd. The right-of-way through such a wilderness was without present value, and would have offered no real inducement, even if it had not been burdened with the rights of transportation reserved by Government. In return for such a barren grant the Government could no more have got the line built than it could get a building company to build for its use a twenty-story office building in a desert in return for the grant of a half-acre site. These facts show that the actual understanding of the parties must have been that the United States would eventually extinguish the Indian title and make the lands public lands, and thus effectuate the grant. The

implied covenant thus corresponds with the real agreement, and the case is typical of the class to which the rule stated applies.

This rule, that one may not defeat one's promise by voluntarily failing to perform, or rendering impossible the happening of a condition which is in one's own control, is not in conflict with those cases in which it is said that performance is indispensable, since the promise was to take effect only on performance. Those cases deal solely with promises conditioned on events not in the sole control of the promisor, but either in that of the promisee or of neither party. On the other hand the principle as we have stated it is amply sustained by authority. The decisions establish not only that in *clear cases*, where, as in our case, the intention of the parties to that effect affirmatively appears, the contract must be construed as containing a covenant by the grantor to either bring about the required event, or not prevent its happening, but they also show that where *there is doubt* the same construction will be adopted. Courts are reluctant so to interpret a contract that the obligation of a promise will be made to depend wholly upon the will of the promisor. It is not to be supposed, unless the language of a contract forces that conclusion, that one party will give a valuable consideration in return for a promise, which the other party need not perform unless he desires to.

In Noyes v. Barnard, 63 Fed. 782 (C. C. A., 9th Cir.), the plaintiff had entered into an agreement with defendants to purchase certain timber lands for defendants, plaintiff to receive a certain share of the profits arising out of the sale of the lands or timber, but the time and terms of the sale to be determined by the defendants. Although no sale had taken place, plaintiff

sued for a breach of the contract, alleging that defendants had had an opportunity to make an advantageous sale, and that an unreasonable time had elapsed. The Court says (pp. 787-788):

> "It is argued that, by the express conditions of the contract, the times and terms of sale of the said lands were to be determined by the plaintiffs in error. * * * Certainly, it was contemplated that the time and terms of the sale of the land were to be fixed by them. The contract cannot be so construed as to leave it to their option to say whether or not a sale should ever take place, or as to whether the time or terms of sale should ever be fixed. It was contemplated that at some time they should be fixed. Courts, unless forced to the conclusion by the terms of a contract, will never hold that one party thereto can elect never to perform it. * * * If said plaintiffs did not determine that the sale should take place within a reasonable time, for a reasonable price, then they committed a breach of their contract with said defendant."

In Reilly v. City of Albany, 112 N. Y. 30, the plaintiff's assignor had contracted to do certain grading, paving and flagging for the City of Albany, the contract providing "that payment for the above-mentioned work is not to be required or to be due until the same shall have been fully completed * * * and until the lapse of thirty days after due apportionment and assessment of the expense of the same shall have been duly approved and confirmed by the common council of said city, according to the statute in such case made and provided; and until the same shall have been collected by the chamberlain from said assessments. * * * and when the same shall be due and

payable as above provided, the said City of Albany, the party of the first part, doth agree and bind itself and its successors". The Court says (pp. 38, 42):

> "It is contended by the appellant that the conditions upon which the defendant agreed to become responsible were not complied with, and that, therefore, no liability had attached to it at the time the action was commenced. * * *
>
> "When the contractor had performed his work according to his contract he had no duty remaining to discharge, and then had a right to rely upon the implied obligation of the city to use with due diligence its own agencies in procuring the means to satisfy his claims. It could not have been supposed that he was not only to earn his compensation, but also to set in motion and keep in operation the several agencies of the city government, over whom he had no control, to place in the hands of the city the funds necessary to enable it to pay its obligations. That was a power lodged in the hands of the city, and the clear intent of the contract was that it should exercise it diligently for the purpose of raising the funds necessary to pay for the improvement. For an omission to do so it would become liable to pay such damages as the contractor might suffer by reason of its neglect of duty."

In Gallagher v. Nichols, 60 N. Y. 438, one Lewis, having contracted to erect certain buildings on lands of the defendant, entered into a subcontract with plaintiff for the cellar work, to be paid for when the first tier of beams should be laid, and gave plaintiff an order on defendant, payable on the completion of the subcontract, which order was accepted by defendant. The Court says (p. 448):

> "It is insisted that there was a failure of the

> condition precedent, which required that the first tier of beams should be laid on and leveled up before any payment was to be made. The answer to this position is, that the act of the defendant prevented the laying of the first tier of beams. The walls were ready for them and the defendant was bound to have them laid within a reasonable time. Instead of this, defendant and Lewis canceled the contract by mutual consent on the twelfth day of August, and Nichols sold the lots. The defendant thus made it impossible for this to be done, and he is estopped from insisting upon any such condition."

To the same effect is Risley v. Smith, 64 N. Y. 576.

Mies v. Tifft, 1 Cow. 98, holds that "a promise by the assignee of a contract, to pay the money due thereon, when collected by due course of law, is broken, if the promisor suffers a term to elapse, after the money is due, without prosecuting therefor."

And see Barber Asphalt Co. v. City of Denver, 72 Fed. 336 (C. C. A., 8th Cir.), in which Reilly v. City of Albany, *supra*, and similar cases, are cited with approval.

Boies v. Vincent, 24 Iowa 387, holds:

> Syll: "If the agreement was to sell upon the condition that the whole number of cattle should be found for delivery by the time agreed upon, that they were not all found at that time would be no defense where defendant purposely made no effort to find them."

Read v. Davis, 35 Me. 379, holds:

> Syll: "One, contracting to pay money, upon receiving a payment to himself from a third person, does not defeat or diminish his liability by a sur-

render of his authority to receive such payment to himself."

In Ray v. Hodge, 15 Ore. 20, the defendant bought an interest in a lease of a mine for consideration expressed as follows: $750 cash, $1,250 when 250 flasks of quicksilver produced." The Court held, (1) that it was inferable that defendant, in connection with the co-lessees, had undertaken to work the mine; (2) that if he had ceased work when the same, if worked in the ordinary mode, would have justified its development, the deferred payment would have become matured.

In the following cases the same principle of law is either applied or enunciated:

Cowart v. Edwards, 4 Tex. Civ. App. 276, 23 S. W. 569;
Long v. Saulfley, 79 Cal. 260, 21 Pac. 757;
City of Chicago v. People, 56 Ill. 327;
Denny v. Campbell, 4 S. W. 301 (Ky.);
White v. Snell, 22 Mass. (5 Pick) 426;
White v. Snell, 26 Mass. (9 Pick.) 16;
Tureman v. Stephens, 83 Mo. 218.

But the conditions necessary to put these lands within the power of disposal by the railroad grantees have not happened because of the Government's own fault and omission of clear duty.

Referring again to the Sinking Fund cases, it is well to quote the vigorous language of Mr. Justice Strong in his dissenting opinion therein (99 U. S. 731, 732):

"Mr. Justice Strong:

"In my opinion, the Act of Congress of May 7, 1878, is plainly transgressive of legislative power. As was said by Mr. Hamilton in his celebrated communication to the Senate of January 20, 1795, 'when a government enters into a contract with an

> individual it deposes, as to the matter of the contract, its constitutional authority, and exchanges the character of legislator for that of a moral agent, with the same rights and obligations as an individual. Its promises may be justly considered as excepted out of its power to legislate, unless in aid of them. It is in theory impossible to reconcile the idea of a promise which obliges, with a power to make a law which can vary the effect of it.' 3 Hamilton's Works, 518, 519. Opinions similar to this have often found expression in judicial decisions, even in those of this Court. If this be sound doctrine, it is as much beyond the power of a legislature, under any pretense, to alter a contract into which the Government has entered with a private individual as it is for any other party to a contract to change its terms without the consent of the person contracting with him. As to its contract the Government in all its departments has laid aside its sovereignty, and it stands on the same footing with private contractors."

It is too plain for discussion or argument that the United States by its legislation, and through no fault or act of the railroad grantee, has, as its own act, legislated in such manner as to destroy all opportunity on the Government's part to thus fulfill its own contract. It is no answer to this argument to say that this has been done for the benefit of the individual Indian. The practical extinction of the Indian tribes, and their subsequent absorption into the State of Oklahoma as citizens thereof were matters of policy voluntarily undertaken by the United States. In so legislating the Government has, however, in legal effect, repudiated its contract made by the grants of 1866, and by its voluntary acts made it impossible to fulfill its original

contract with its railroad grantees made in and by such acts. The Government's brief assumes the existence of power in the Government to thus legislate; to thus destroy the common or tribal Indian title, and to allot the lands in severalty to the individual Indians. But in doing that it has voluntarily parted with that essential and fundamental title which, as sovereign, it held over all these lands when the grants of 1866 were made. In doing all of this the argument of policy may be effective as demonstrating the wisdom of the Government's action, but it can in no manner answer the legal objection that in so doing the Government, by its voluntary acts, and by its own choice, has made impossible the happening of the conditions on which the grant *in praesenti*, made by the Act of 1886, could ripen into full enjoyment in the railroad grantee by the extinguishment of "the Indian title" by treaty or otherwise, as was the plainly expressed purpose of the Act of 1866, in conformity with the then and long-continued policy of the Government, upon which the Act of 1866 was based. And treated, as it must be, as a contract it became executed and binding on both sides, through the railroad grantee's admitted performance of all the conditions requisite to give it such executed and binding force.

TENTH.

The facts stated in the petition constitute a cause of action within the jurisdiction of the Court of Claims, and that court should have overruled the demurrer.

Act of Cong., March 3, 1887, 24 Stat. L. 505;
New York Indians v. United States, 170 U. S. 1 *et seq.*;

Choctaw Nation v. United States, 119 U. S. 1 *et seq.*;
The Milliken Printing Co. v. United States, 40 Ct. Cl. Rep. 81, s. c. 202 U. S. 168, Bk. 50, L. Ed. 980;
State of Kansas v. United States, 204 U. S. 331;
Brown v. United States, 6 Ct. Cl. 171;
United States v. Curtner, 38 Fed. Rep. 1;
Choctaw Nation *et al.* v. United States *et al.*, 34 Ct. Cl. 17;
United States v. Great Falls Mfg. Co., 112 U. S. 645, 16 Ct. Cl. 160;
United States v. Lynah, 188 U. S. 445;
Bonner v. U. S., 9 Wal. 156;
U. S. v. Louisiana, 123 U. S. 32;
Noble v. Railroad Co., 147 U. S. 165;
U. S. v. Schurz, 102 U. S. 378;
Pawlett v. Clarke, 9 Cranch 292.

The Act of Congress of March 3rd, 1887, provides:

"That the Court of Claims shall have jurisdiction to hear and determine the following matters:

"All claims founded upon the Constitution of the United States or any law of Congress * * * or upon any contract expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity or admiralty if the United States were suable."

In the Milliken Printing Company case the Court of Claims held:

"This Court having equity power by the Tucker Act, is not its jurisdiction as complete as it was in the Harvey case, under the special act giving

the Court jurisdiction? Equity jurisdiction is given by both, and the reformation and correction of a contract is among the landmarks of equitable jurisdiction of courts of chancery. * * *

"The jurisdiction of the Court of Claims is not general. It may not have the right to grant injunctions or decree the performance of contracts; but where a suit will result simply in a decree for the payment of money it has jurisdiction under the Tucker Act as fully as other courts of equity, and as fully as it has, under certain special acts, such as that under which the Harvey case was brought."

In the case last mentioned this Court held:

"The Government objects at the outset that the Court of Claims has no jurisdiction in equity, and that, although the petitioner's demand is for money under a contract as it should have been drawn, yet in this suit that demand is incident to the reformation asked, which certainly is true. Reformation is not an incident to an action at law, but can be granted only in equity. When relief is granted also on the contract as reformed, it means only that the Court sees fit to go on and finish the whole case. But we are of opinion that the Court was warranted in taking jurisdiction under a fairly liberal interpretation of the Act of March 3, 1887, Chap. 359, Sec. 1, 24 Stat. at L. 505, U. S. Comp. Stat. 1901, p. 752. That section gives the Court of Claims jurisdiction of 'all claims founded * * * upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity or admiralty if the

> United States was suable.' A claim for money upon a contract, which would be like a right of action at common law, but for the need of help from equity to establish the contract, seems to us to fall within these words in their obvious, literal sense. District of Columbia v. Barnes, 197 U. S. 146, 150, 152, 49 L. Ed. 699-701, 25 Sup. Ct. Rep. 401; South Boston Iron Works v. United States, 34 Ct. Cl. 174, 200."

In the New York Indian case, *supra*, it was held that this Court had jurisdiction of a suit of the Osage Indians for the value of lands which had been granted to them *in praesenti*, but which were afterwards disposed of to others under the land laws of the United States. It is true that in that case an Act of Congress authorized the Indian nation to sue, but the necessity of the act was because under the jurisdiction of this Court as it stood, without special act, only citizens of the United States could have brought the suit and to remove the bar of the statute of limitation.

In this connection it should be remembered that counsel for the Government in their "motion on behalf of the United States and others to dismiss, for want of jurisdiction, and brief thereon" (page 14), the case of the State of Kansas, Complainant, v. The United States of America and others in this Court, expressly conceded and insisted that if the allotments of the lands to the Indians "should be taken from them, which is a part of the relief sought by the bill, the United States would be subject, under the Acts of Congress and its agreements with them, to a demand from them for the value thereof or for other lands (30 Stats. L. 517)" ("Curtis Act"), and this Court held that the United States was the real party in interest, because, in the event

that the Indians should be deprived of their lands which had been allotted to them, by the land grant to the railroad company, then the United States would be subject to the demand of the Indians for the value thereof. We contend that if the railroad company has been deprived of its granted lands by allottees and purchasers claiming under the United States, then the Government is liable to the railroad company for the value of the lands. And this proposition is sustained by the opinion of this Court in the State of Kansas case.

In the case of Brown v. The United States, 6 Court of Claims Reports 171, it is said:

> "The legislative power has committed to this Court the duty of giving such redress in all cases where the claim is founded upon contract express, or upon contract implied, or upon a law of Congress. The act is remedial—to remedy great mischiefs and to avoid many grievous wrongs. It deserves to be liberally construed, and so as to repress the mischief and advance the remedy. There is a certain modesty in courts declining doubtful jurisdiction, which in ordinary cases is commendable and wise. But ordinary cases are those wherein the party may seek a certain jurisdiction elsewhere, and not cases where legal redress would utterly fail. In such, declining jurisdiction means denial of justice, and a decision which pronounces a citizen having a legal right absolutely without legal redress, is a decision abhorrent to the common law. In such doubtful cases, doubts are to be resolved in favor of right and justice."

In Choctaw Nation v. United States, 119 U. S. 1 *et seq.*, among other things sued for were certain lands which had been granted by treaties to the Choctaw Na-

tion, and which were taken away from the nation by the United States when it surveyed the line dividing the Indian Territory from the State of Arkansas (*Id.*, p. 4). The allegations of the petition were:

> "It is alleged in the petition that, by the treaties of January 20, 1825, 7 Stat. 234, of September 27, 1830, 7 Stat. 333, and of June 22, 1855, 11 Stat. 611, the boundary line between the lands of the United States and the Choctaws west of the Mississippi River was established, but that the United States, in fixing and causing to be surveyed the said boundary line, did not pursue the line in accordance with the provisions of the said treaties, but encroached upon and took from the lands ceded to the Choctaw Nation a quantity of land amounting to 136,204.02 acres, which by the legislation of the United States, in violation of these provisions of the treaties, became a part of the public domain of the United States, for which the Choctaw Nation are entitled to recover their value, estimated at $167,896.57."

Judgment was had in the Court of Claims for the value of these lands, and the judgment was affirmed on appeal, the Court saying (*Id.*, p. 41):

> "There is, however, another controversy arising under the treaty of 1855. The first article of that treaty fixed definitely the boundary of the territory ceded to the Choctaw Nation by the treaty of 1820. It is found as a fact by the Court of Claims that, in the location of the line which was surveyed under the authority of the United States and fixed as the permanent boundary between the State of Arkansas and the Indian country by the Act of Congress of March 3, 1875, 18 Stat. 476, the Government made a mistake whereby they embraced

> in the territory appropriated by the United States as part of the public lands, 136,204 2-100 acres of Indian lands, the value of which, as ascertained by the Court of Claims, is $68,102. This is a just and valid claim for which the petitioner is entitled to recover."

This case is a controlling authority upon the proposition that where lands are granted, or contracted to be granted, and the United States afterwards violates the grant, that it is responsible for the value of the lands.

In Choctaw and Chickasaw Nations v. United States and the Wichita and affiliated bands of Indians, 34 Ct. Cl. 17, the Court, at page 103, said:

> "The ratification of the Spanish treaty which fixed the boundary of the United States on the line of the one hundredth meridian was subsequent to the ratification of the treaty with the Choctaws which gave to those people the land that extended to the source of the Canadian. With the ratification of the Spanish treaty, however, such title as had been granted to the Choctaws became extinguished. Ratification related back to the time of the signing of the treaty as between the United States and Spain (Vattel B. 4, C. 2, Sec. 22; Davis v. Police Jury, 9 How. 280, 289; Haver v. Yaker, 9 Wall. 32-34). The treaty with Spain being binding on the United States from the date of the signing thereof, the treaty rights of domestic Indians to the land itself was lost, but the right to compensation for the value of the land remained with the Choctaws as against the Government which first gave and then took from them the land."

This is a clear decision to the effect that where lands

are granted by Congress and subsequently taken away the grantee has the right, as against the Government, to compensation for the value of the lands.

In United States v. Curtner, 38 Fed. Rep. 1, in speaking of certain lands granted to the Central Pacific Railroad Company, the Court said (page 7):

> "Besides, we do not think the Government is wholly without interest. If these lands are within the statutory grant, the company has earned them by a full performance of its part of the statutory contract, and an absolute indefeasible right to a patent, unincumbered by any cloud, has vested. The Government, in that case, is legally bound to make a good title. *It is liable to perform its part of the contract, and issue the patent as required by the statute. The United States are, therefore, responsible to the railroad company for the land, or its full value.* By the mistake of their officers they have put it out of their power to comply with their contract; and they are interested to the full value of the land in setting aside the listing and patents resulting from their mistakes, or having them judicially adjudged inoperative and void, in order that they may relieve themselves from their liability."

In United States v. Great Falls Manufacturing Company, 112 U. S. 645 (16 Ct. Cl. 160), this Court *held that where property of an individual is taken by the Government, the Government is under an implied obligation to make just compensation to the owner.* In this case the Government was providing a water-works system for the cities of Washington and Georgetown, and in doing so it was necessary to construct a dam at the Great Falls of the Potomac, and an aqueduct. *In carrying out this public enterprise the Government*

took possession of and appropriated to this public use certain land and property of the Great Falls Manufacturing Company. Suit was instituted before the Court of Claims (16 Ct. Cl. 160) for the value of the land and property rights of the plaintiff so appropriated. The suit was based upon the liability of the Government for the property taken. The Court of Claims held in favor of the claimant. Among other things the Court of Claims said:

> "The rights of the claimants in the present instance clearly arise *ex contractu* and not *ex delicto*. If there be a failure in the completeness and validity of the convention between the Government and the claimants, such failure has arisen from the technical incorrectness of forms, which would have been sufficient to bind it had they been entirely accurate. Such defect may deprive the obligation of the character of an express contract, but does not prevent it from falling within the category of implied contracts. It is certainly inconsistent with any pretense that the obligation is *ex delicto*.
>
> "It only remains to determine the amount of the compensation which the claimants are entitled to recover.
>
> "The measure of this compensation is defined in the language of the Constitution: Private property shall not be taken for public use 'without just compensation'."

On appeal, this Court said:

> "Beyond doubt the land and water rights and privileges in question have for twenty years been held and used by officers and agents of the Government, without any compensation whatever having been made therefor to the claimant. *By what*

authority have they appropriated to public use the property of the claimant? The answer to this question will determine whether the present demand of the claimant arises out of an implied contract, and, therefore, enforceable by suit against the United States in the Court of Claims.

"It seems clear that these *property rights* have been held and used by the agents of the United States, *under the sanction of legislative enactments by Congress;* for the appropriation of money specifically for the construction of the dam from the Maryland shore to Conn's Island was, all the circumstances considered, *equivalent to an express direction by the legislative and executive branches of the Government to its officers to take this particular property, for the public objects contemplated* by the scheme for supplying the capital of the nation with wholesome water. The making of the improvements necessarily involves the taking of the property, and if, for the want of formal proceedings for its condemnation to the public use, the claimant was entitled, at the beginning of the work, to have the agents of the Government enjoined from prosecuting it until provision was made for securing, in some way, payment of the compensation required by the Constitution—upon which question we express no opinion—there is no sound reason why the claimant might not waive that right, and, electing to regard the action of the Government as a taking under its sovereign right of eminent domain, demand just compensation. Kohl v. United States, 91 U. S. 367-374. *In that view, we are of the opinion that the United States, having by its agents, proceeding under the authority of an Act of Congress, taken the property of the claimant for public use, are under an obligation, imposed by the Constitution, to make compensation. The law will imply a promise to*

make the required compensation, where property, to which the Government asserts no title, is taken, pursuant to an Act of Congress, as private property to be applied for public uses. Such an implication being consistent with the constitutional duty of the Government, as well as with common justice, the claimant's cause of action is one that arises out of implied contract, within the meaning of the statute which confers jurisdiction upon the Court of Claims of actions founded 'upon any contract, express or implied, with the Government of the United States.'"

In United States v. Lynah, 188 U. S. 445, where suit was brought under Court of Claims act, it is again held, following the decision in the Great Falls Manufacturing Company case, *that when the United States Government appropriates property to public uses, it does so under an implied contract that it will pay the value of the property*, and that where the Government of the United States, in the construction of a dam or other public work, floods lands belonging to an individual so as to totally destroy their value, there is a taking of private property within the scope of the Fifth Amendment, and that notwithstanding the work causing the injury was done in the improvement of a navigable river, the injuries cannot be regarded as consequential, and that the Government cannot appropriate property without being liable to the obligation created by the Fifth Amendment of paying just compensation. In this case the various decisions of the Supreme Court were reviewed, and, in addition, the Court said:

"It does not appear that the plaintiffs took any action to stop the work done by the Government, or protested against it. Their inaction and silence

amount to an acquiescence—an assent to the appropriation by the Government. *In this respect the case is not dissimilar to that of a landowner who, knowing that a railroad company has entered upon his land and is engaged in constructing its road without having complied with the statute in respect to condemnation, is estopped from thereafter maintaining either trespass or ejectment, but is limited to a recovery of compensation.* Roberts v. Northern Pacific R. R., 158 U. S. 1, 11; Northern Pacific Railroad v. Smith, 171 U. S. 260, and cases cited in the opinion.

* * * * * * * *

"It is clear from these authorities that where the Government by the construction of a dam or other public works so floods lands belonging to an individual as to substantially destroy their value, *there is a taking within the scope of the Fifth Amendment. While the Government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee may be vested. Of course, it results from this that the proceeding must be regarded as an actual appropriation of the land, including the possession, the right of possession and the fee; and when the amount awarded as compensation is paid the title, the fee, with whatever rights may attach thereto—in this case those at least which belong to a riparian proprietor—pass to the Government, and it becomes henceforth the full owner.*"

In this connection, the concurring opinion of Justice Brown should be read, wherein, among other things, he said:

"But I think our jurisdiction may be supported, *irrespective of the question of contract*, or tort,

under that clause of the Tucker Act which vests the Court of Claims with jurisdiction of 'all claims founded upon the Constitution of the United States or any law of Congress'.

"As we had occasion to remark in Dooley v. United States, 182 U. S. 222-224, the first section of the Tucker Act evidently contemplates *four distinct classes of cases*: (1) those founded upon the *Constitution or any law of Congress*, with an *exception* of *pension cases;* (2) cases founded upon a regulation of an Executive Department; (3) *cases of contract, express or implied*, with the Government; (4) actions *for damages*, liquidated or unliquidated, in cases *not sounding in tort*. The words, 'not sounding in tort', *are in terms referable only to the fourth class of cases.*

"In my view, *claims founded upon the Constitution may be prosecuted in the Court of Claims, whether sounding in contract or in tort;* and wherever the *United States may take proceedings in eminent domain* for the condemnation of lands for public use, the owner of such lands may seek relief in the *Court of Claims if his lands be taken without such proceedings, whether such taking be tortious or by virtue of some contract, express or implied, to that effect.*"

In Noble v. Union River Logging Railroad Company, 147 U. S. 165, it is held that where the Secretary of the Interior, in the exercise of powers conferred upon him, designates a certain railroad company as being entitled to a right-of-way over public land, his decision cannot be revoked by a successor in office, the Court holding that by the decision of the Secretary the railroad company became "*at once vested with a right of property*" *in the lands in question, and that any at-*

tempted revocation by a successor in office would be the taking of property "without due process of law". The effect of this decision is that where the Government parts with its title it is not competent for the Government, either through a subsequent Act of Congress or through any act of any of its officials, *to retake the property or reassert title thereto.*

In the case of United States v. Schurz, 102 U. S. 378, cited in this opinion, it was held that where the Government had issued a patent to land to an individual "*the land had ceased to be the land of the Government, or, to speak in technical language, title has passed from the Government and the power of these officers to deal with it has also passed away*".

In the case at bar the Government granted us title to the land in question, and after the date of the grant the Government, neither through its legislative branch, nor through its executive branch, can retake the land or assert title thereto without compensation. And whatever the Government has undertaken to do in that way certainly does not bind the railway company nor change the grant to us.

In the case of the Town of Pawlet v. Daniel Clark and Others, 9 Cranch 292, it is expressly held that *where a grant of land is made it cannot be resumed by the grantor.*

In Bonner v. United States, 9 Wall. 156, Mr. Justice Davis, in delivering the opinion of the Court, said:

> "*If the position of the counsel of the United States, that the Court of Claims has no authority to hear a case of this character, be well taken, we are relieved of the necessity of deciding the merits of the controversy.*
>
> "The claimant insists that there was no power

to establish Ludlow's line as the true boundary, and exclude entries on the west side of it, as Virginia did not assent to this action on the part of Congress, and as it is demonstrable that this line does not include all the lands between the two rivers.

"If this position be correct, this claim is based on the theory that the United States has violated the trust contained in the deed of cession of the Northwestern Territory, and is bound in good conscience to furnish compensation to the Virginia beneficiaries who suffer by this misconduct. This makes a case for the interposition of a court of equity, and if it were a controversy between two private suitors, it would have to be settled there, for a court of law could not afford the proper mode and measure of relief. But the Court of Claims has no equitable jurisdiction given it, and was not created to inquire into rights in equity set up by claimants against the United States. Congress did not think proper to part with the consideration of such questions, but wisely reserved to itself the power to dispose of them. ('The Tucker Act' now so provides.)

"Immunity from suit is an incident of sovereignty, but the Government of the United States, in a spirit of great liberality, waived that immunity in favor of those persons who had claims against it which were founded upon any law of Congress or regulation of an executive department, or upon any contract with it, express or implied, and gave the Court of Claims the power to hear and determine cases of this nature.

"The inquiry then arises whether the present case, in view of this limited jurisdiction, is one that the Court of Claims had a right to consider. The answer to this question seems to us of easy solu-

tion. It is not pretended that there was any regulation of a department to justify the entries in dispute, and it is certain, instead of having a law of Congress to rest upon, they were made in violation of the whole course of legislation by Congress on the subject. Congress has not only, in fixing the boundary line of the reservation, excluded these entries, but has also limited the time in which the holders of warrants of the class in question should have the right to locate them, and, in addition to this, has forbidden their location on tracts of land for which patents had been previously issued, or which had been previously surveyed.

"As the land in question had been previously patented to individuals, or granted for the use of schools, it follows that the attempt on the part of the claimant to locate his warrants on them was contrary to law, and that the claim which he now makes for compensation, because of the failure of this proceeding, cannot be said to be founded on a law of Congress. Nor can it be said to be based on a contract in the sense of the law conferring jurisdiction on the Court of Claims. That court was authorized to enforce legal rights and obligations, but it could not proceed further and judge of the equities between the citizen and his Government. In the absence of legislation by Congress the holder of a Virginia military bounty warrant can have no legal right against the United States for compensation on the allegation that the Government has wrongfully appropriated to other uses the lands ceded for his benefit. It is only a contract authorized by law that the Court of Claims can consider, and as there is no law of Congress on this subject there is nothing on which that court could base a judgment against the United States if, in the opinion of that tribunal, it had not fulfilled its duties towards the beneficiaries

under the Virginia deed of cession. The liability of the Government, if at all, arises out of the breach of an accepted trust, and that liability cannot be enforced at law. The claimant is in no better position because the Government is the trustee than he would be if a private person occupied that relation, and it is very clear, if such were the case, that a court of equity would alone have the power to deal with him.

"As the Government has not thought fit to allow itself to be sued in the Court of Claims on equitable considerations, it follows that the remedy of the claimant, if any now exists, is with Congress.

"The judgment of the court below is reversed, and the case is remanded to that court with directions to dismiss the petition for want of jurisdiction."

In the case of United States v. Louisiana, 123 U. S. 32, it was held that a claim could be prosecuted in the Court of Claims against the United States *for a money judgment, where the United States had appropriated to other uses certain lands which had been granted to the State of Louisiana* The facts were that by an Act of Congress of September 28, 1850, the United States granted to the public-land States then in the Union all the swamp and overflowed lands made unfit thereby for cultivation.

It was held that this grant was one *in praesenti*. It appeared that, *notwithstanding this grant of swamp lands, the Government had thereafter sold many of the swamp lands to other parties*. The claim was filed in the Court of Claims, pursuant to an Act of Congress of March 2, 1855, 10 Stat. L. 634. The grant was made under an Act of Congress of September 28, 1850, 9 Stat. L. 519.

The case of *The State of Kansas v. United States et al.*

At the October Term, 1904, of the Supreme Court of the United States, the State of Kansas, as complainant, filed an original proceeding against the United States, Ethan A. Hitchcock, Secretary of the Interior, the Commissioner of Indian Affairs, the Commissioners to the Five Civilized Tribes, the Indian Inspector for the Indian Territory, United States Indian Agent, the Muskogee or Creek Nation or Tribe of Indians, the principal chief thereof, and a number of named allottees of land in the Muskogee or Creek Nation whose allotments, in whole or in part, were included within any alternate section of land or parts thereof, designated by odd numbers, to the extent of ten sections per mile on each side of the Missouri, Kansas & Texas Railway, and all persons holding, or claiming to hold, any title under said allottees. The named allottees were sued as representatives of the whole class of allottees, of whom there were about five thousand.

In that case the State of Kansas, as trustee under the Land Grant Act, sought a decree finding and adjudging that the State of Kansas was the owner, as trustee for the Missouri, Kansas & Texas Railway Company, in *fee-simple* of all lands situated in the Muskogee or Creek Nation covered by the land grant.

At that time only in the Creek or Muskogee Nation had the allotment of lands under the congressional scheme of allotment been practically completed, and, for that reason, the State of Kansas, in that litigation, only sought a decree as to the lands covered by the land grant in the Creek Nation.

The United States filed a brief in that case in opposition to the motion for leave to file the bill contending

that the suit was not one in which the Supreme Court had original jurisdiction, and, among other claims, claimed that the State of Kansas had no substantial interest in the subject-matter, and was only nominally the complainant, and that, therefore, the case did not fall under that provision of the Constitution which gave the Supreme Court original jurisdiction of cases "in which a State shall be a party", and the further claim was made that the United States was not suable in the Supreme Court of the United States, because it had not consented to be sued in that court. In that case the United States also contended that if the allotments to the Creek Indians "should be taken from them, which is a part of the relief sought by the bill, the United States would be subject, under Acts of Congress and its agreements with them, to a demand from them for the value thereof, or for other lands", and that the United States was the real party in interest as defendant.

It was further claimed in that brief on behalf of the Government that the Creek lands were "burdened with an Indian right of occupancy secured to them by treaty", and that "the Indians were in possession by virtue of a patent theretofore issued to their tribal nation by the United States".

Leave was granted by the Supreme Court to file the bill without prejudice, upon the ground that an application by a State is usually granted as of course.

Afterwards, the United States filed a demurrer, and, in lieu of the demurrer, a motion to dismiss was afterwards submitted.

The bill in that case was filed by the Attorney-General of Kansas upon direction of the Governor of that State, as trustee for the Missouri, Kansas & Texas

Railway Company. The State of Kansas asserted that, by the Land Grant Acts in question, the lands were granted by the United States to the State of Kansas as trustee, to aid the construction of a railroad through the Indian Territory; that the Missouri, Kansas & Texas Railway Company became entitled to construct its road through the Indian Territory under the acts in question; that its road was constructed and all the conditions of the Act of July 25th, 1866, fully performed and the grant of lands were fully earned; that thereafter, under authority of certain Acts of Congress and agreements with the Creek Nation or Tribe of Indians, the common or tribal Indian title and the ultimate title in fee theretofore held by the United States and granted to the State of Kansas for the benefit of the Missouri, Kansas & Texas Railway Company, were sought to be merged into individual ownership of the entire fee title, by allotment and conveyance to separate individual members of the Creek Nation in specific and separate tracts, which resulted in the extinction of the common tribal title or mere right of occupancy, and the substitution therefor of an estate in *fee-simple*, which had already been transferred to the State of Kansas, as trustee for the Missouri, Kansas & Texas Railway Company.

The prayer for relief was in the alternative: First, for a decree establishing perfect title in the State of Kansas as trustee for the Missouri, Kansas & Texas Railway Company, or a decree for the money value of the property as against the United States for the breach of the original contract.

This Court held that, from the face of the bill, it appeared the State of Kansas was only nominally a party plaintiff, and that the real party plaint-

iff was the railway company, and further held that the United States was the real party in interest as defendant, and had not consented to be sued in the Supreme Court of the United States, and that, therefore, the suit could not be maintained under its original jurisdiction.

In the motion on behalf of the United States and others to dismiss this case for want of jurisdiction, and the brief in support thereof, and at page 14 of the brief, the Government specifically claimed:

> "In this case the parties defendant other than the United States and its officers are Creek Indian allottees and persons claiming under them, and if their allotments should be taken from them, which is a part of the relief sought by the bill, the United States would be subject, under Acts of Congress and its agreements with them, to a demand from them for the value thereof or for other lands (30 Stat. L. 514)."

30 Statutes at Large, p. 514, referred to in this claim, is what is known as the "Curtis Act". *The claim, therefore, which was made by the Government in that case was not that the Government would have been liable to the individual Indians under any of the old Indian treaties and Indian tribal patents relating to the tribal title, but the claim was distinctly made that if, after the Government had patented to the individual Indians the full fee-simple title under and pursuant to the various Acts of Congress covering the allotment of lands in severalty, that then the Government would be liable, should the lands be taken away from the allottees, for the value thereof, and very properly the Supreme Court held that the Congress of the United States*, if, after having granted the lands in severalty

to the Indians, conveyed the full *fee-simple* title thereto, and the Indian lands should be taken away from them by the Government, it would be liable. Upon that point the Supreme Court said:

> "In the present case the parties defendant, other than the United States and its officers, are Creek Indian allottees and persons claiming under them, and *if their allotments should be taken from them, which is part of the relief sought by the bill, the United States would be subject to a demand from them for the value thereof, or for other lands.*"

Applying the same doctrine to our case, the United States is clearly liable to us, because they had first granted the lands to us and afterwards granted them by patents in severalty to the Indians.

The Lynah Case (188 U. S. 445), *supra*, has not been modified or departed from in any subsequent case by this Court.

In the case of C., B. & Q. Ry. Co. v. People of the State of Illinois, 200 U. S., at page 593, the Court say:

> "The constitutional requirements of due process of law, which embraces compensation for private property taken for public use, applies in every case of the exertion of governmental power. If in the execution of any power, no matter what it is, the Government, Federal or State, finds it necessary to take private property for public use, it must obey the constitutional injunction to make or secure just compensation to the owner. Cherokee Nation v. Southern Kansas Railway, 135 U. S. 641, 659; Sweet v. Rechel, 159 U. S. 380, 399, 402; Monongahela Nav. Co. v. United States, 148 U. S. 312, 336; United States v. Lynah, 188 U. S. 445. If the means employed have no real, substantial relation to public objects which government may

legally accomplish; if they are arbitrary and unreasonable, beyond the necessities of the case, the judiciary will disregard mere forms and interfere for the protection of rights injuriously affected by such illegal action. The authority of the courts to interfere in such cases is beyond all doubt. Minnesota v. Barber, 136 U. S. 313, 320. Upon the general subject there is no real conflict among the adjudged cases. Whatever conflict there is arises upon the question whether there has been or will be in the particular case, within the true meaning of the Constitution, a 'taking' of private property for public use. If the injury complained of is only incidental to the legitimate exercise of governmental powers for the public good, then there is no taking of property for the public use, and a right to compensation, on account of such injury, does not attach under the Constitution. Such is the present case. There are, unquestionably, limitations upon the exercise of the police power which cannot, under any circumstances, be ignored. But the clause prohibiting the taking of private property without compensation 'is not intended as a limitation of the exercise of those police powers which are necessary to the tranquility of every well-ordered community, nor of that general power over private property which is necessary for the ordinary existence of all governments. It has always been held that the Legislature may make police regulations, although they may interfere with the full enjoyment of private property and though no compensation is given.' Sedgwick's Stat. & Const. Law, 434."

In the case of Manigault v. Springs, 199 U. S., at page 484, the Court say:

"The question whether the overflow of lands

constitutes 'a taking' within the constitutional provision has been discussed in several cases in this court. Pumpelly v. Green Bay Co., 13 Wall. 166; Transportation Company v. Chicago, 99 U. S. 635; Gibson v. United States, 166 U. S. 269; Scranton v. Wheeler, 179 U. S. 141; Atwater v. Trustee, 124 N. Y. 602.

"A recent case is that of United States v. Lynah, 188 U. S. 445, wherein it was held that where the Government had placed dams and other obstructions in the Savannah River in such manner as to hinder its natural flow, and to raise the water so as to overflow plaintiff's lands and to cause a total destruction of their value, the proceeding must be regarded as actual appropriation of the land, and created an obligation upon the Government to make compensation for the land. This case was distinguished from that of Mills v. United States, 46 Fed. Rep. 738, wherein the damage consisted in obliging the plaintiff to raise the levees around his rice fields to prevent the flooding of the fields in high water. 'Obviously', said the Court, in commenting upon that case, 'there was no taking of plaintiff's lands, but simply an injury which could be remedied at an expense, as alleged, of $10,000, and the action was one to recover the amount of this consequential injury. The Court rightfully held that it could not be sustained'. A still more recent case is that of Bedford v. United States, 192 U. S. 217, in which it is held that damages to lands by flooding as a result of revetments erected by the United States along the banks of the Mississippi River to prevent erosion of the banks from natural causes, are consequential and do not constitute a taking of the lands flooded within the meaning of the Constitution.

"We think the rule to be gathered from these cases is that where there is a practical destruction,

or material impairment of the value of plaintiff's lands, there is a taking, which demands compensation, but otherwise where as in this case plaintiff is merely put to some extra expense in warding off the consequences of the overflow.

"The damage claimed by the plaintiff in the interruption of access to his lands and the impairment of his right to navigate the creek does not demand separate consideration. We have repeatedly held that where the Government of the United States has, for the purposes of improving the navigation of a river, erected piers or other structures by which access to plaintiff's land is rendered more difficult, there is no claim for compensation. Gibson v. United States, 166 U. S. 269; Scranton v. Wheeler, 179 U. S. 141. We see no reason why the same principle should not apply to cases where the State Legislature, exercising its police power, directs a certain dam to be built, and thereby incidentally impairs access to lands above the dam. In both cases the sovereign is exercising its constitutional right in one case in improving the navigation of the river, and in the other in draining its low lands, and thereby enhancing their value for agricultural purposes."

In the case of Bedford v. United States, 192 U. S., at page 224, the Supreme Court say:

"The Constitution provides that private property shall not be taken without just compensation, but a distinction has been made between damage and taking, and that distinction must be observed in applying the constitutional provision. An excellent illustration is found in Gibson v. United States, 166 U. S. 269. The distinction is there instructively explained, and other cases need not be cited. It is, however, necessary to refer to United States v. Lynah, 188 U. S. 445, as it is especially

relied upon by appellants. The facts are stated in the following excerpt from the opinion:

"'It appears from the fifth finding, as amended, that a large portion of the land flooded was in its natural condition between high-water mark and low-water mark, and was subject to overflow as the water passed from one stage to the other; that this natural overflow was stopped by an embankment, and in lieu thereof, by means of flood gates, the land was flooded and drained at the will of the owner. From that it is contended that the only result of the raising of the level of the river by the Government works was to take away the possibility of drainage. But findings nine and ten show that, both by seepage and percolation through the embankment and an actual flowing upon the plantation above the obstruction, the water has been raised in the plantation about eighteen inches, that it is impossible to remove this overflow of water, and, as a consequence, the property has become an irreclaimable bog, unfit for the purpose of rice culture or any other known agriculture, and deprived of all value. It is clear from these findings that what was a valuable rice plantation has been permanently flooded, wholly destroyed in value, and turned into an irreclaimable bog; and this as the necessary result of the work which the Government has undertaken.'

"The question was asked, 'Does this amount to a taking?' To which it was replied, 'The case of Pumpelly v. Green Bay Co., 13 Wall. 166, answers this question in the affirmative.' And further: 'The Green Bay Company, as authorized by statute, constructed a dam across Fox River, by means of which the land of Pumpelly was overflowed and rendered practically useless to him. There, as here, no proceedings had been taken to formally condemn the land.' In both cases, therefore, it

was said that there was an actual invasion and appropriation of land as distinguished from consequential damage. In the case at bar the damage was strictly consequential. It was the result of the action of the river through a course of years. The case at bar, therefore, is distinguishable from the Lynah case in the cause and manner of the injury. In the Lynah case the works were constructed in the bed of the river, obstructed the natural flow of its water, and were held to have caused, as a direct consequence, the overflow of Lynah's plantation. In the case at bar the works were constructed along the banks of the river and their effect was to resist erosion of the banks by the waters of the river. There was no other interference with natural conditions. Therefore the damage to appellant's land, if it can be assigned to the works at all, was but an incidental consequence of them."

In Juragua Iron Co. v. United States, 212 U. S. 297, it was held that an action could not be maintained against the United States for the destruction or taking of property under the recognized rules of war in Cuba, though taken under orders of General Miles. Among other things the Court said (page 302):

"By the Act of March 3d, 1887, providing for the bringing of suits against the Government of the United States, the Court of Claims was given jurisdiction to hear and determine all claims 'founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the

United States, either in a court of equity or admiralty, if the United States were suable' (24 Stat. 505, c. 359).

"Manifestly, no action can be maintained under this statute unless the United States became bound by implied contract to compensate the plaintiff for the value of the property destroyed, or unless the case—regarding it as an action to recover damages—be one 'not sounding in tort'.

"The plaintiff contends that the destruction of the property by order of the military commander representing the authority and power of the United States was such a taking of private property for public use as to imply a constitutional obligation, on the part of the Government, to make compensation to the owner. Const. Amend. V. In support of that view it refers to United States v. Great Falls Mfg. Co., 112 U. S. 645, 656; Great Falls Mfg. Co. v. Attorney-General, 124 U. S. 581, 597-8; United States v. Lynah, 188 U. S. 445. Let us examine those cases.

"United States v. Great Falls Mfg. Co., 112 U. S. 645, 656, was a case of the taking for public use by agents and officers of the United States proceeding under the authority of an Act of Congress of certain private property—lands, water rights and privileges—which were held by and used by the Government for nearly twenty years, without any compensation being made to the owner. A suit was brought against the United States in the Court of Claims and judgment was rendered for the claimant. This Court said: 'It seems clear that these property rights have been held and used by the agents of the United States under the sanction of legislative enactments by Congress; for the appropriation of money specifically for the construction of the dam from the Maryland shore to Conn's Island was, all the circumstances considered, equiv-

alent to an express direction by the legislative and executive branches of the Government to its officers to take this particular property for the public objects contemplated by the scheme for supplying the capital of the nation with wholesome water. The making of the improvements necessarily involves the taking of the property; and if, for the want of formal proceedings for its condemnation to public use, the claimant was entitled, at the beginning of the work, to have the agents of the Government enjoined from prosecuting it until provision was made for securing in some way payment of the compensation required by the Constitution —upon which question we express no opinion— there is no sound reason why the claimant might not have waived that right, and, electing to regard the action of the Government as a taking under its sovereign right of eminent domain, demand just compensation. Kohl v. United States, 91 U. S. 367, 374. In that view we are of opinion that the United States, having by its agents, proceeding under the authority of an Act of Congress, taken the property of the claimant for public use, are under an obligation, imposed by the Constitution, to make compensation. The law will imply a promise to make the required compensation, where property, to which the Government asserts no title, is taken, pursuant to an Act of Congress, as private property to be applied for public use. Such an implication being consistent with the constitutional duty of the Government, as well as with common justice, the claimant's cause of action is one that arises out of implied contract, within the meaning of the statute which confers jurisdiction upon the Court of Claims of actions founded "upon any contract, express or implied, with the Government of the United States."

"In reference to the subsequent case of Great Falls Mfg. Co. v. Attorney-General, 124 U. S. 581, 597, it may be said that so far as it has any bearing upon the present controversy it reaffirms the principle announced in United States v. Great Falls Mfg. Co., 112 U. S. 645, 656. The Court said: 'It is sufficient to say that the record discloses nothing showing that he (the Secretary of War) has taken more land than was reasonably necessary for the purposes described in the Act of Congress, or that he did not honestly and reasonably exercise the discretion with which he was invested; and, consequently, the Government is under a constitutional obligation to make compensation for any property or property right taken, used and held by him for the purposes indicated in the Act of Congress, whether it is embraced or described in said survey or map, or not. * * * Even if the Secretary's survey and map, and the publication of the Attorney-General's notice did not in strict law justify the former in taking possession of the land and water rights in question, it was competent for the company to waive the tort, and proceed against the United States, as upon an implied contract, it appearing, as it does here, that the Government recognizes and retains the possession taken in its behalf for the public purposes, indicated in the act under which its officers have proceeded.'

"In United States v. Lynah, 188 U. S. 445, 464 5, which involved the inquiry whether the injury done to certain lands as the result of work done on the Savannah River by the United States was a taking of private property for public use, the Court said: 'The rule deducible from these cases is that when the Government appropriates property which it does not claim as its own it does so under an implied contract that it will pay the value of the

property it so appropriates. * * * So the contention that the Government has a paramount right to appropriate this property may be conceded, but the Constitution in the Fifth Amendment guarantees that when this governmental right of appropriation—this asserted paramount right—is exercised it shall be attended by compensation. * * * Whenever in the exercise of its governmental rights it takes property, the ownership of which it concedes to be in an individual, it impliedly promises to pay therefor.'

"It is clear that these cases lend no support to the proposition that an implied contract arose on the part of the United States to make compensation for the property destroyed by order of General Miles. The cases cited arose in time of peace and in each it was claimed that there was within the meaning of the Constitution an actual taking of property for the use of the United States, and that the taking was by authority of Congress. That taking, it was adjudged, created by implication an obligation to make the compensation required by the Constitution. But can such a principle be enforced in respect of property destroyed by the United States in the course of military operations for the purpose, and only for the purpose, of protecting the health and lives of its soldiers actually engaged at the time in war in the enemy's country. We say 'enemy's country' because, under the recognized rules governing the conduct of a war between two nations, Cuba, being a part of Spain, was enemy's country, and all persons, whatever their nationality, who resided there were, pending such war, to be deemed enemies of the United States and of all its people. The plaintiff, although an American corporation, doing business in Cuba, was, during the war with Spain, to be deemed an enemy of the United States with respect of its

property found and then used in that country, and such property could be regarded as enemy's property, liable to be seized and confiscated by the United States in the progress of the war then being prosecuted; indeed, subject under the laws of war to be destroyed, whenever, in the conduct of military operations, its destruction was necessary for the safety of our troops or to weaken the power of the enemy."

In Union Bridge Co. v. United States, 204 U. S. 364, it was held that the United States could compel the removal of bridges which obstructed navigation without compensating the owner, under the power to regulate commerce. The Supreme Court referred to the case of C., B. & Q. Ry. Co. v. Drainage Commissioners, 200 U. S. 561, and the case of West Chicago Street Railroad v. Chicago, 201 U. S. 524, and, after quoting fully therefrom, say (page 399):

"Do the principles announced in the above cases require us to hold, in the present case, that the making of the alterations of its bridge specified in the order of the Secretary of War will be a taking of the property of the bridge company for public use? We think not. Unless there be a taking, within the meaning of the Constitution, no obligation arises upon the United States to make compensation for the cost to be incurred in making such alterations. The damage that will accrue to the bridge company, as the result of compliance with the Secretary's order, must, in such case, be deemed incidental to the exercise by the Government of its power to regulate commerce among the States, which includes, as we have seen, the power to secure free navigation upon the waterways of the United States against unreasonable obstruc-

tions. There are no circumstances connected with the original construction of the bridge, or with its maintenance since, which so tie the hands of the Government that it cannot exert its full power to protect the freedom of navigation against obstructions. Although the bridge, when erected under the authority of a Pennsylvania charter, may have been a lawful structure, and although it may not have been an unreasonable obstruction to commerce and navigation as then carried on, it must be taken, under the cases cited, and upon principle, not only that the company when exerting the power conferred upon it by the State, did so with knowledge of the paramount authority of Congress to regulate commerce among the States, but that it erected the bridge subject to the possibility that Congress might, at some future time, when the public interest demanded, exert its power by appropriate legislation to protect navigation against unreasonable obstructions. Even if the bridge, in its original form, was an unreasonable obstruction to navigation, the mere failure of the United States, at the time, to intervene by its officers or by legislation and prevent its erection, could not create an obligation on the part of the Government to make compensation to the company if, at a subsequent time, and for public reasons, Congress should forbid the maintenance of bridges that had become unreasonable obstructions to navigation. It is for Congress to determine when it will exert its power to regulate interstate commerce. Its mere silence or inaction when individuals or corporations, under the authority of a State, place unreasonable obstructions in the waterways of the United States, cannot have the effect to cast upon the Government an obligation not to exert its constitutional power to regulate interstate commerce except subject to the condi-

> tion that compensation be made or secured to the individuals or corporations who may be incidentally affected by the exercise of such power. The principle for which the bridge company contends would seriously impair the exercise of the beneficent power of the Government to secure the free and unobstructed navigation of the waterways of the United States. We cannot give our assent to that principle. In conformity with the adjudged cases, and in order that the constitutional power of Congress may have full operation, we must adjudge that Congress has power to protect navigation on all waterways of the United States against unreasonable obstructions, even those created under the sanction of a State, and that an order to so alter a bridge over a waterway of the United States that it will cease to be an unreasonable obstruction to navigation will not amount to a taking of private property for public use for which compensation need be made."

This case and the principle which it declares demonstrates the plain distinction between the taking of property by the Government (as here) and the removal of property consequent upon the Government's exercise of the power of regulation to which it is necessarily subjected in cases of that nature, *i. e.*, when interfering with interstate commerce.

At page 126 of the Government's reply brief in the Court of Claims counsel said:

> "If the Indians have no title to the lands in dispute, the railroad company can establish its right and title to the same by bill in equity against the allottees or patentees, to remove cloud from the title, or it may bring an action at law in ejectment, if and when the Indians can be sued in respect of lands allotted to them by the Government."

The concluding phrase of this quotation seems to answer the suggestions of counsel. How could either of the courses suggested be pursued when the United States have condemned our title and taken and appropriated the lands for governmental purposes. Where a land owner knows that a railroad company has entered upon his land and is engaged in constructing its road without having complied with the statute in respect to condemnation, he is thereafter estopped from maintaining either trespass or ejectment, but is limited to a recovery of compensation. Roberts v. Northern Pacific R. R. Co., 158 U. S. 1; Northern Pacific R. R. Co. v. Smith, 171 U. S. 260. The same doctrine is applicable here, for in United States v. Lynah, 188 U. S. 445, 465, *supra*, it was aptly said:

> "The Government may take personal or real property whenever its necessities or the exigencies of the occasion demand. So the contention that the Government has a paramount right to appropriate this property may be conceded, but the Constitution in the Fifth Amendment guarantees that when this governmental right of appropriation—this asserted paramount right—is exercised it shall be attended by compensation."

Counsel for the Government in the court below contended that, "By *legislation subsequent* to the date of the Act of July 25, 1866, *Congress has asserted that there was no grant*. The *Department of the Interior has asserted in effect* that the Act of July 25, 1866, *was no grant*, and that the action of the Secretary of the Interior should be taken as the action of the President himself," citing Marbury v. Madison, 1 Cr. 137. Evidently counsel for the Government regarded this

statement as horn-book law, because they cited no authorities in support thereof and did not quote any part of the opinion in Marbury v. Madison to support this strange doctrine, that Congress may legislate away, by construction, rights previously granted, or that officers of the Government of the United States may, by their acts, destroy vested rights, or finally determine the proper construction of contracts. The Court of Claims treated this "subsequent legislation"—the Act of April 26, 1906, declaring that what had been done did not make the lands "public land" as conclusive against the railroad company.

By Act of March 2, 1890, 26 Stat. L. 96, it was expressly provided that "the Constitution of the United States * * * shall have the same force and effect in the Indian Territory as elsewhere in the United States."

In Downs v. Bidwell, 182 U. S. 244, it was held that where the Constitution has once been formally extended by Congress to Territories, neither Congress nor the Territory Legislature can enact laws inconsistent therewith.

In Hurtado v. California, 110 U. S. 516, it is said that "*law is something more than mere will exerted as an act of power.* It must be not a special rule for a particular person or a particular case." In the course of the opinion in this case it is pointed out that law excludes acts directly transferring one man's estate to another, legislative judgments and decrees, and other similar special, partial and arbitrary exertions of power under the forms of legislation.

In Jones v. Meehan, 175 U. S. 1, it is stated that "*the construction of treaties is the peculiar province of the judiciary*, and except in cases *purely political*,

Congress has no constitutional power to settle the rights under a treaty, or to affect title already granted by the treaty itself", citing numerous authorities.

In Garfield v. United States, 211 U. S. 249, this Court, in an opinion by Mr. Justice Day, held (page 262):

> "In our view this case resolves itself into a question of the power of the Secretary of the Interior in the premises, as conferred by the Acts of Congress. We appreciate fully the purpose of Congress in numerous acts of legislation to confer authority upon the Secretary of the Interior to administer upon the Indian lands, and previous decisions of this Court have shown its refusal to sanction a judgment interfering with the Secretary where he acts within the powers conferred by law. *But as has been affirmed by this Court in former decisions, there is no place in our constitutional system for the exercise of arbitrary power*, and, if the Secretary has exceeded the authority conferred upon him by law, then there is power in the Court to restore the status of the parties aggrieved by such unwarranted action."

Congress cannot declare what the *law is* or *has been*. That is a *judicial function* which appertains to the courts (Ogden v. Blackledge, 2 Cranch. 272).

As this Court said in Choate v. Trapp, 224 U. S. 665, "*There is a broad distinction between tribal property and private property, and between the power to abrogate a statute and the authority to destroy rights acquired under such a law.*" Whatever power remained in the Government to deal with the Indian title, no power remained in the Government to *destroy the rights acquired in the Indian lands under the grant to the railway company*. That was a *vested property*

right in no way subject to the *governmental powers of the United States*, and, as decided by this Court in the case last mentioned, it was a property right "*now protected by the Constitution of the United States*", and, paraphrasing the language of the Court in that case, "*no statute is valid which increased the life estate of the Indians into a fee estate which had already been granted to the railway company, and there was no power in the Congress to lessen any of the rights of property which had been vested in the railway company. Such rights are protected from repeal by the provisions of the Fifth Amendment.*"

The word "title" has no special sanctity attached to it. Lord Coke, many years ago, defined title to be "that by which one holds possession of lands". The right by which Indian tribes hold land has been over and over again called its title by this Court. For instance, in U. S. v. Cook, 19 Wall. 591, this Court, speaking of the Indian right of occupancy, said, "This is the title by which other Indians hold their land." And again, this Court said, in L. L. & G. v. United States, 92 U. S. 733, "that in the free exercise of their choice they might hold it forever," but they could only *hold* it. The fee was in the United States subject to the right of the Indians to hold. The Dawes Commission, in its various reports, expressly found that the Indians would not accept an allotment of their lands in severalty, as provided for in the old Indian treaties—an allotment simply of possessory rights, but would only agree to an allotment upon condition that the United States would breach its contract with the Railroad Company and grant to the Indians its reversionary estate in and to the lands, and, in order to bring about an allotment of this kind, which was a departure

from the established practice in the past as shown by the case of Veale v. Maynes, 23 Kas. Rep. 1, *supra*, decided by Judge Brewer when on the Supreme Bench of Kansas, the Congress of the United States elected to stand responsible to the Railway Company as and for the breach of the grant to it of the reversionary interest, and grant the fee to the lands, including the title of the railroad, to the Indians in severalty, and, accordingly, the Act of 1893 was passed, expressly providing that the United States should join in the allotment deeds and grant to the Indians its reversionary interest in the estate therein and thereto. As very properly held by this Court in Choate v. Trapp, *supra*, this "contemplated most radical changes in the political and *property rights of the Indians*". That which has been done was never contemplated in 1866 by any one, either in the Indian treaties, the tribal patents, or in the grant of the lands to the railway company subject to the extinguishment of the Indian title as it then existed. The *radical change* has been made, if the decision of the Court of Claims is to stand, at the expense of the railroad company. Its property was taken from it by the United States and given to the Indians. This the Government could only do by paying to the railroad company the value of the lands, and the Government, we submit, should not be put in any other attitude (Northern Pacific R. R. v. United States, *infra*). The passage of the Act of Congress providing that, upon the extinguishment of the Indian title, the lands should not become public lands, was ineffective as against the vested rights of the railroad company. The contract, as between the Government and the railroad company, could not be changed by legislative action, such as the Act of April 26, 1906, upon the part of the Govern-

ment (Reichert v. Felps, 6 Wall. 160). The provision of the act referred to was nothing more than a self-serving statement made by one of the contracting parties.

The Court of Claims expressly found that it was the policy of the Government in 1866, and prior thereto, to acquire Indian lands wherever it could in the interest of civilization, and to remove the Indians to some distant reservation carved out of other public lands, and that the presence of so many Indian tribes in the Western country was the result of that policy, and the Court of Claims further expressly found that "the United States, no doubt, anticipated and had a right to anticipate that such a course might follow in reference to the lands granted in the Act of July 25, 1866. * * * *Subsequent to the passage of the act a different policy was inaugurated by the United States with respect to the Indian tribes and tribal lands.*" The Court of Claims further found that the extinguishment of the Indian title was a contingency which "*was certain to happen in one way or another*".

All the surrounding circumstances, the policy of the Government from the beginning, the expressed declaration in the grants of 1866 that they were made for the purpose of aiding construction of railroads through the Indian Territory—in short, the whole *res gestae* demonstrates this. No man then living, and an actor in the transaction, could have prophesied such change in Government policy as would seek to destroy the legal effect and moral obligation of the legislation embodied in the grants of 1866, and which had become executed because fully performed on the part of the railroad grantee.

In Northern P. R. Co. v. United States, 227 U. S. 355, 366, 33 Sup. Ct. Rep. 368, this Court said:

> "If the Government may control the cession and control the survey, and by the action of its agents foreclose inquiry or determine it, an easy means of rapacity is afforded, much quieter, but as effectual as fraud. We should hesitate to put the Government in that attitude."

In Heckman v. United States, 224 U. S. 413, where the legislation of Congress looking into the allotment of lands in the Indian Territory was fully and carefully reviewed, this Court expressly held that under the Indian treaties and tribal patents, the United States retained a reversionary interest in and to the Indian lands, and that the Indian title was simply a title for their common use and occupancy, and that the conditions bringing about the allotment of the land in severalty as it was allotted, and converting the Indian Territory into a state, was because *an exigency had arisen, originally unforeseen, requiring the adoption of new measures*, and that by the Act of March 3rd, 1893, the United States first gave its consent to the allotment of the land in fee and severalty, and agreed to *grant its reversionary interest to the individual Indians*. In this case, this Court expressly held that the Dawes Commission was established for the purpose of extinguishing the national or tribal title. This Court further said:

> "This national interest is not to be expressed in terms of property, or to be limited to the assertion of rights incident to the ownership of a reversion or to the holding of technical title in trust. When, in 1838, patent was issued to the Cherokees, pro-

viding that it was subject to the condition that the granted lands should revert to the United States if the Cherokee Nation became extinct or abandoned them, neither the rights nor the duties of the United States were confined to the reversionary interest thus secured."

The decision of the Court of Claims that the treaties of 1866 with the Choctaws and Chickasaws (article 11 *et seq.*), and also with the Cherokees (article 20), in providing at the option of the Indians for allotment in severalty of their lands negatives any purpose of Congress by enactment *pari passu* (Acts of 1866) to grant them to a railroad company to aid in construction of a railroad across the Indian Territory is unsound.

(*a*) The treaties contemplate only a severance of the Indian title. They have no relation, express or implied, to the fee or reversionary interest of the United States. That is plain from the mere reading of them.

(*b*) The treaty with the Choctaws and Chickasaws by article XI *et seq.* does not provide for individual allotment of all the lands, but only for a quarter section (160 acres) to each qualified member of those tribes. *Non constat* that the immense area then possessed by those tribes would have been all appropriated by such allotments if then made, or that the odd numbered sections granted to this claimant company would be needed for such allotment purposes. So that the United States could, for aught that appears on this record, have made the allotments to the Indians and yet protected our grant in so doing.

(*c*) The Cherokee treaty, by article XX, provided only that the Cherokee Nation might make such allotments subject to the supervision of the Secretary of the Interior. This was never done.

(*d*) There is no provision for allotment in the treaty with the Creeks. By Act of March 2, 1889 (25 Stats., p. 757), they ceded to the United States all their interest in the "west half of their entire domain", thereby greatly diminishing the area available for any subsequent allotment to the individuals of that tribe.

(*e*) Neither treaty provided or contemplated that the United States would convey to any such possible allottees *any* part of the title of the United States in such lands. The Curtis Act of 1898 did so provide, and the United States, by the deed or patent issued to each allottee, *did* make conveyance of its title and to this claimant's manifest prejudice. It thus took away what had been conveyed to the railway company.

Counsel for the Government in the Court of Claims laid great stress upon the *Langford Case*, first decided by the Court of Claims in 12 Ct. of Claims Rep. 338, and afterwards by this Court in 101 U. S. 341. They attempted to show that these decisions control our case rather than Great Falls Co. v. United States, 112 U. S. 645, and United States v. Lynah, 188 U. S. 445, which we rely upon.

The Langford case was decided by the Court of Claims in 1876, *over ten years before the passage of the Tucker Act*. The facts in that case, as found in the reporter's statement of the case in the Court of Claims, were:

1. In 1836 the American Board of Commissioners for Foreign Missions, a religious corporation, by its agent, Rev. H. H. Spaulding, entered upon and occupied the premises in controversy as a missionary station among the Indian tribes in the Territory of Oregon. There was no grant of any kind of the lands in question (a 640-acre tract) by the Government of the

United States to the American Board of Commissioners for Foreign Missions, but the occupancy was with the assent of the Nez Perce Indians, who inhabited that portion of the Territory of Oregon, and in fact the lands in question were "allotted" to the American Board of Commissioners for Foreign Missions by this tribe.

2. The American Board of Commissioners for Foreign Missions, hereinafter for brevity called "the Board", continued to occupy the premises as a missionary station until December, 1847, when a hostile tribe of Indians advanced upon the station with the intent to destroy the occupants thereof, and Spaulding was compelled to, and did, leave the missionary station and seek refuge in one of the forts of the Hudson Bay Company. Spaulding and the Board were prevented by Indian hostilities from returning to the missionary station until the spring of 1860.

3. Early in 1860, about the time Spaulding returned to occupy the premises, the Superintendent of Indian Affairs and the Indian agent of the United States entered upon the premises claimed by the Board, and there established a United States Indian agency, occupying such of the buildings erected by the Board as then remained standing. The United States Indian agent refused to restore possession to the Board, and in 1862 he refused to allow a surveyor employed by the Board to run the lines or otherwise locate the lands claimed by the Board. The United States Indian agent maintained possession under instructions from the Secretary of the Interior.

4. In 1868 the Board brought an action to recover possession of the premises in the District Court of the Territory of Idaho against James O'Neil, as defend-

nt, who was then United States Indian agent and controlled the premises. O'Neil appeared and filed a demurrer. Afterwards W. G. Langford was substituted as plaintiff in the action in lieu of the Board, alleging that he had become the sole owner of the premises since the commencement of the action, and in 1869 Robert Newall was substituted as defendant, on the ground that O'Neil had delivered possession of the premises to Newall. In 1869, the defendant having failed to answer, judgment was entered in favor of the plaintiff, whereby it was adjudged that he should recover possession of the premises. Newall succeeded O'Neil as United States Indian Agent.

5. Langford tried to secure possession of the premises under a writ issuing from the Court, but under instructions from the Secretary of the Interior the Indian Agent refused to surrender possession "until ejected by the Sheriff". In 1874 a second writ was issued, under which plaintiff acquired possession of the premises.

6. After Langford had secured possession of the premises the Indian Agent entered into a contract with him, renting from Langford a portion of the buildings, but when these facts were reported to the Commissioner of Indian Affairs the Indian agent was directed to refuse all demands of Langford for the payment of rent, and the Indian Agent was directed that if any attempt should be made in consequence of his refusal to pay to eject him, to call upon the commanding officer of the nearest military post for protection. Langford was subsequently forcibly ejected by military force.

7. The deed of the Board to Langford was simply a

quit claim deed, and was made and executed while the premises were the subject of litigation.

On behalf of the Government it was contended that the Board never had any title to convey to Langford. As previously stated, Langford had no grant from the Government, but he simply went into possession with the consent of the Nez Perce tribe of Indians.

By Act of Congress to establish a territorial government for Oregon it was, among other things, provided:

> "Provided further, That the title to the land, not exceeding six hundred and forty acres, now occupied as missionary stations among the Indian tribes in said Territory, together with the improvements thereon, be confirmed and established in the said several religious societies to which said missionary stations respectively belong."

And by an Act of Congress of 1853 it was, among other things, provided:

> "Provided further, That the title to the land, not exceeding six hundred and forty acres, now occupied as missionary stations among the Indian tribes in said Territory, or that may have been so occupied as missionary stations prior to the passage of the act establishing the territorial government of Oregon, together with the improvements thereon, be, and is hereby, confirmed and established to the several religious societies to which said missionary stations respectively belong."

And in both of said Acts of Congress it was provided:

> "Provided, That nothing in this act contained shall be construed to affect the authority of the

> Government of the United States to make any regulation respecting the Indians of said Territory, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to make if this act had never been passed."

Subsequently treaties were made by which the Indians ceded to the United States their lands, and the United States ceded back to them the very land in controversy as a reservation.

The opinion of the court by Justice Nott is short, and we quote it at length:

> "The act to establish the territorial government of Washington, 2d March, 1853 (10 Stat. L. 172, Sec. 1), contained this provision:
>
> "'Provided further, That the title to the land, not exceeding six hundred and forty acres, now occupied as missionary stations among the Indian tribes in said Territory, or that may have been so occupied as missionary stations prior to the passage of the act establishing the territorial government of Oregon, together with the improvements thereon, be, and is hereby, confirmed and established to the several religious societies to which said missionary stations respectively belong.'
>
> "And the Court has found as a fact that the American Board of Commissioners for Foreign Missions had occupied as a missionary station the land which is the subject of the present controversy prior to the act establishing the territorial government of Oregon. The point has been made by the defendants that this occupancy had been abandoned when the Act of 1853 was passed by Congress; but the Court, against the objection, has found that the alleged abandonment was involuntary, being rendered absolutely necessary by

the imminence of great danger from a hostile force; that it was made with the intent of returning; and that the missionary in charge did in fact return with the intent of re-occupying at the earliest possible moment. The Court entertains no doubt that this enforced temporary absence, accompanied by the *animus revertendi* and due diligence, did not disturb the legal occupancy of missionaries within the true intent of the statute.

"The title thus assured to the American Board was what is known in our public land law as a 'statutory title'. At least one Attorney General, and when speaking of this individual statute, has said 'that a grant of public land by statute is the highest and strongest form of title known to the law'; and that 'it is stronger than a patent, for a patent may be annuled by the judiciary upon a proper case shown of fraud, accident, or mistake, while even Congress cannot repeal a statutory grant'. (Opinion of Attorney General Bates, May 27, 1864.) The Supreme Court moreover has intimated in the recent case of the Carondelet Canon (11 C. Cls. R. 367) that it is now the settled law that a patent is unnecessary to perfect a statutory grant, and that the title becomes perfect on the completion of the survey necessary to define it.

"But at the time the claimant's entry was made, and at the time the Act of 1853 was passed, the public surveys had not been made and the Indian title was not extinguished. Analogous cases enable us to say that if the ordinary course of things had extended to this tract, if in time the public surveys had defined it and the Indian title had been extinguished, the statutory grant would have been perfected and the title of the American Board would have become complete. But here an opposite current of events has flowed, for the tract still remains un-surveyed and the grant undefined; and

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by subsequent treaties with the Indians this tract in dispute has become a part of a permanent Indian reservation.

"The statutory grant was in absolute terms, and it 'confirmed and established' in the claimant's grantors such title as the Government then had. As in the case of a warranty deed any subsequent title which the Government might acquire would inure to the benefit of the grantees. But nevertheless, at that time, as has been said, the Indian title to the property had not been divested, and since then by several treaties between them and the United States this property has been reserved by and ceded to the Indians (Treaties 11th June, 1855, 12 Stat. L. 957, Art. 11; 9th June, 1863, 14 *Id.* 647, Art. 11; 13th August, 1868, 15 *Id.* 693, Art. 1). It is therefore a case of statute against treaty; of the former being in direct conflict with the latter; and the question is, which is to be taken as paramount law?

"If this question were a new one we should approach the determination of it with reluctance and perhaps in doubt; but it has already been before the Supreme Court, and has received a unanimous and, we must believe, final determination by that tribunal. In the case of Gaines v. Nicholson (9 How. R. 356), one party claimed in like manner under a statutory grant, and the other under a subsequent Indian treaty. The language of the Supreme Court is unequivocal, and, as it seems to us, conclusive:

"'No previous grant of Congress could be paramount, according to the rights of occupancy which this Government has always conceded to the Indian tribes within her jurisdiction. It was so much carved out of the territory ceded, and remained to the Indian occupant, as he had never parted with it. He holds, strictly speaking, not

demurrer to the jurisdiction had been overruled. The declaration did not show that the premises were a portion of a permanent Indian reservation, nor that the Indian title had never been divested and had been expressly reserved and confirmed by treaty. The nominal defendant did not come in and set up either the title of the United States or the title of the Nez Perce tribe. All that the judgment on demurrer or by default established was that the claimant was entitled to possession on that day. It did not establish either as fact or law that the Indian title had become extinct, nor were the Indians directly or impliedly before the court to be estopped by its judgment.

"In this case the defendants are sued for use and occupation, and they show that they do not hold in their own right, but under the Indian title, and as trustees or guardians of the Indians by virtue of that peculiar relation which subsists between the Government and the Indian tribes. They could only be held liable for the rent of these premises in virtue of some privity of contract between themselves and the claimant, or in consequence of some obligation assumed for the Indians and ratified by treaty. As to the former, all presumptions in its favor would be negatived by a judgment in ejectment, certainly up to that time; as to the latter, no such obligation was established by the judgment, and if it had been this court would be without jurisdiction to enforce it (Rev. Stat., Sec. 1066).

"It should also be noted that the claimant's right of action, whatever it may be worth, can hardly be maintained in its present form. This action has been brought under the decision of this court in Johnson's case (4 C. Cls. R. 248). There the court found that the claimant's property had been taken for temporary use, and accordingly

fixed the compensation in the form of an annual rent. In this case the property, if taken from the claimant, was taken by virtue of the treaties ceding it back to the Nez Perce tribe. It is settled that private property can be taken for public use by the terms of a treaty (Meade's case, 2 C. Cls. R. 224). That a treaty with an Indian tribe is as supreme law as a treaty with a foreign power is clearly shown, if it could be doubted, by the cases cited by the defendant's counsel. The taking and present holding of this property, under and by virtue of a treaty of cession, must be deemed a taking in perpetuity or of the fee. That taking would exclude the relation of landlord and tenant within the decision of the Supreme Court in Carpenter's case (9 C. Cls. R. 18).

"A number of other points have been raised by the defendants' counsel, but the Court confines its decision to the claimant's title. That title having failed the action must fail.

"The judgment of the Court is that the petition be dismissed."

The case in every particular is dissimilar to the case at bar, and, besides, at that time, under the law as it then existed, claims could not be prosecuted against the Government of the United States founded upon the *Constitution of the United States*. At that time the jurisdiction of the Court of Claims was limited to "*all claims founded upon any law of Congress or upon any regulation of the Executive Department, or upon any contract, expressed or implied,* with the Government of the United States, and all claims which may be referred to it by either house of Congress" (Sec. 1059, R. S. U. S. 1879).

If the law had read then as it does now, that claims could be prosecuted in the Court of Claims against the

United States based upon the Constitution of the United States, *it is transparently clear that the Court would not have held that private property could be taken for public use without compensation even by the terms of a treaty, as held by the Court in this Langford case.*

In the Supreme Court, in the opinion by Mr. Justice Miller, it was said:

> "The first question arising in this case concerns the jurisdiction of the Court of Claims, upon the suggestion of the Attorney-General that the claim is not founded on contract, either expressed or implied. That court could have no cognizance of the case on any other ground, according to the express language of the statute defining its jurisdiction (R. S., Sec. 1059)."

The Court further held that the taking and holding possession of the premises "was an unequivocal tort", conceding that the title or even the right to the possession of the premises was in the grantee. In the course of his opinion Mr. Justice Miller said:

> "The other point is one which requires more delicate handling.
>
> "We are not prepared to deny that when the Government of the United States, by such formal proceedings as are necessary to bind it, takes for public use, as for an arsenal, custom-house, or fort, land to which it asserts no claim of title, but admits the ownership to be private or individual, there arises an implied obligation to pay the owner its just value.
>
> "It is to be regretted that Congress has made no provision by any general law for ascertaining and paying this just compensation. As we are not called on to decide that when the Government, act-

ing by the forms which are sufficient to bind it, recognizes the fact that it is taking private property for public use, the compensation may not be recovered in the Court of Claims. On this point we decide nothing.

"What is pertinent to the present case is that, conceding that principle, it does not confer on that court the authority to decide that the United States, in asserting the right to use its own property, is using that of an individual, and in taking possession of such property under claim of title, and retaining it by force against an opposing claimant, has come under an implied contract to pay him for the use of the property. In the first case, the Government admits the title of the individual and his right to compensation. This right to compensation follows from two propositions, that it was private property and was taken for public use, neither of which is disputed.

"It is a very different matter where the Government claims that it is dealing with its own, and recognizes no title superior to its own. In such case the Government, or the officers who seize such property, are guilty of a tort, if it be in fact private property. No implied contract to pay can arise any more than in the case of such a transaction between individuals. It is conceded that no contract for use and occupation would, in that case, be implied.

"Congress, in establishing a court in which the United States may primarily be sued as defendants, proceeded slowly and with great caution. As at first organized, the Court of Claims was merely an auditing board, authorized to pass upon claims submitted to it, and report to the Secretary of the Treasury. He submitted to Congress such confirmed claims as he approved, with an estimate for their insertion in the proper appropriation

bill. Such as he disapproved demanded no further action.

"It was by reason of that feature of the law that this court refused to exercise the appellate jurisdiction over awards of that court which the Act of Congress attempted to confer, because the court was of opinion that the so-called Court of Claims was not, in the constitutional sense, a court which could render valid judgments, and because there could be no appeal from the Supreme Court to the Secretary of the Treasury. Gordon v. United States, 2 Wall., 561. An Act of Congress removing this objectionable feature having passed the year after that decision, the appellate power of this court has been exercised ever since. The jurisdiction of that court has received frequent additions by the reference of cases to it under special statutes, and by other changes in the general law; but the principle originally adopted, of limiting its general jurisdiction to cases of contract, remains. There can be no reasonable doubt that this limitation to cases of contract, express or implied, was established in reference to the distinction between actions arising out of contracts, as distinguished from those founded on torts, which is inherent in the essential nature of judicial remedies under all systems, and especially under the system of the common law.

"The reason for this restriction is very obvious on a moment's reflection. While Congress might be willing to subject the Government to the judicial enforcement of valid contracts, which could only be valid as against the United States when made by some officer of the Government acting under lawful authority, with power vested in him to make such contracts, or to do acts which implied them, the very essence of a tort is that it is an unlawful act, done in violation of the legal

rights of some one. For such acts, however high the position of the officer or agent of the Government who did or commanded them, Congress did not intend to subject the Government to the results of a suit in that court. This policy is founded in wisdom, and is clearly expressed in the act defining the jurisdiction of the court; and it would ill become us to fritter away the distinction between actions *ex delicto* and actions *ex contractu*, which is well understood in our system of jurisprudence, and thereby subject the Government to payment of damages for all the wrongs committed by its officers or agents, under a mistaken zeal, or actuated by less worthy motives.

"The question is not a new one in this court.

"In Nichols v. United States (7 Wall. 122), where a suit was brought in the Court of Claims to recover back money exacted of an importer in excess of the duties allowed by law, the Court held that no contract to refund was implied, because the money, though paid under protest, was paid voluntarily, and for this reason, among others, that court had no jurisdiction.

"In Gibson v. United States (8 *Id.* 269) an army contractor, who had agreed to furnish two hundred thousand bushels of oats at a fixed price, had, as this court held, after delivering part of the amount, been legally released from the obligation to deliver the balance. He was, however, carried before the military authority in a state of fear and trepidation, and to save himself further trouble agreed to and did deliver the remainder of the oats. He sued in the Court of Claims for the difference between the contract price and the market price of the oats at the time of the delivery. One ground of his claim was that he acted under duress and the constraint of fear, and that his

agreement to deliver at the contract price was void.

"This Court said, in answer to this argument, that 'it is not to be disguised that this case is an attempt, under the assumption of an implied contract, to make the Government responsible for the unauthorized acts of its officers, those acts being in themselves torts. * * * The language of the statutes which confer jurisdiction upon the Court of Claims excludes, by the strongest implication, demands against the Government founded on torts. The general principle which we have already stated as applicable to all governments forbids, on a policy imposed by necessity, that they should hold themselves liable for unauthorized wrongs inflicted by their officers on the citizen, though occurring while engaged in the discharge of official duties. * * * These reflections admonish us to be cautious that we do not permit the decision of this court to become authority for righting in the Court of Claims all wrongs done to individuals by the officers of the General Government, though they have been committed while serving the Government and in the belief that it was for its interest. In such cases, where it is proper for the nation to furnish a remedy, Congress has wisely reserved the matter for its own determination.'

"With the reaffirmation of this doctrine, which excludes the present case from the jurisdiction of that court, it judgment dismissing the petition of plaintiff is affirmed."

Neither Langford nor those from whom he purchased had any direct title from the Government. The Board for Foreign Missions simply took possession of some Indian lands with the consent of the Indians, without any specific grant of the lands either from

the Indians or from the Government of the United States, as expressly stated in the reporter's statement of the case. The Board for Foreign Missions afterwards quitclaimed to Langford, and evidently from that time on the lands were not used for religious purposes. It is true that in an Act of Congress providing for the establishment of a territorial government for Oregon it was provided that "the title to land, not exceeding 640 acres, now occupied as missionary stations * * * be confirmed and established in the said several religious societies." A similar provision was contained in a later Act of Congress of 1853, but in both of said acts it was further provided that nothing therein contained should affect the authority of the Government "to make any regulation respecting the Indians of said Territory, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to make if this act had never been passed". It will therefore be seen that in the Langford case Congress did not undertake to add to or change the title which Langford or the Board for Foreign Missions had. It simply confirmed that title, whatever it was, and it is well settled that Indians cannot sell their lands direct to individuals, and whatever rights the Board for Foreign Missions acquired by the consent of the Indians it certainly was not a *fee-simple* title. Counsel for the Government in their reply brief expressly admit that the Indians cannot sell their lands to individuals. It is clear in the Langford case that neither the Indians nor the Government meant that the lands there in question should be used for barter and sale, but only for missionary stations.

This case is but illustrative of the doctrine, which is thoroughly well settled by all of the cases in the

Supreme Court, that the United States Government is not liable and cannot be held liable for the unauthorized acts of its officers. But the case is in entire harmony with the decisions upon which we rely, that where officers and agents of the United States Government, acting in pursuance of and under express legislative authority, take the property of an individual and the Government expressly ratifies such action on the part of its agents and officers, that it is liable both under the Fifth Amendment to the Constitution of the United States and as upon an implied contract to pay the value thereof.

In addition to the *Lanaford Case* the only other case greatly relied upon by the Government as breaking the force and applicability of the Great Falls Case and the Lynah Case, relied upon by us, is *Hill v. United States*, 149 U. S. 593, which, for convenience, may be called the "Lighthouse Case".

That was a suit brought in 1888 in the Circuit Court of the United States for the District of Maryland under the Tucker Act, being the Act of March 3, 1887, for the use and occupation of land taken possession of and used by the United States for a lighthouse known generally as Miller's Island Lighthouse. Hill claimed that he was seized and possessed in *fee simple* of a tract of land in Baltimore County, in the State of Maryland, fronting upon Chesapeake Bay, "with all the riparian rights attached thereto under the law of this State" (Maryland), and that since his acquisition of said land and rights the United States Government had used and occupied a valuable part thereof for the lighthouse without any compensation to the claimant and without his consent, and he claimed damages for the use and occupation thereof in the sum of $9,999.

The Government on its part claimed that the land referred to and described in the petition was "submerged land and a part of the bottom of the Chesapeake Bay, one of the navigable waters of the United States, and that the said defendant (United States), under the law, for the purposes of a lighthouse, has the paramount right to its use as against the plaintiff or any other person."

In the Circuit Court certain findings of fact were made, among others, that no part of the land included in the deed of the plaintiff had been used or occupied by the United States, but that a site on the rear range line of Craighill Channel, situated about two hundred yards from the shore line of the plaintiff's land, had been occupied and used by the United States; that the said site is submerged land in the Chesapeake Bay, one of the public navigable waters of the United States and within the ebb and flow of the tide, and water about two feet deep at low tide. The Circuit Judge further found that Craighill Channel was a channel in Chesapeake Bay, and was constructed by the United States and was used by ocean vessels in their approach to the port of Baltimore, and that the lighthouse was constructed by the United States in the year 1874, and was an important and necessary aid to the navigation of said channel. The Court further found that Miller's Island, belonging to the plaintiff, had been chiefly valuable for gunning for geese, swan and ducks, and fishing privileges, and that the erection of the lighthouse had diminished the value of the plaintiff's island for those purposes. But the Circuit Judge further found, as conclusions of law, that the legal title to the site of the lighthouse in question was in the State of Maryland, subject to the riparian rights of the plaint-

iff, but that under Article 1, Section 8 of the Constitution of the United States, which provides that Congress shall have power to regulate commerce with foreign nations, "both the title of the State of Maryland and the riparian rights of the plaintiff are subject to the paramount rights of the United States to use and occupy the site in question for the purposes of commerce, which includes navigation, without condemnation or compensation, the submerged land forming the site of the lighthouse being, as to such a use by the United States, public and not private property".

It will, therefore, be seen that in this case Hill claimed the land under no direct grant from Congress. This fact alone distinguishes the case from the case at bar. In our case we have either a grant *in praesenti* of the lands in question, or a grant thereof *in futuro*, or a simple contract on the part of the Government to grant the same. For the purposes of this cited case, it is immaterial whether the lands were granted *in praesenti* or *in futuro*, or that there was a mere agreement on the part of the United States to grant them. In this Lighthouse Case, the Supreme Court, commenting upon the Langford Case, pointed out that it was simply held that the United States was not liable for torts committed in any way by their officers, where such officers were not *acting in pursuance of legislative authority. Every act of which we complain on the part of the United States and its officers was in conformity to and under the sanction of the Congress of the United States, and the Government cannot now shield itself behind the acts of its agents and officers on the ground that they exceeded their authority, or that their acts were unqualified torts.*

Further along in the opinion in the Lighthouse Case,

and in commenting upon the Langford Case, it was said (p. 599):

> "The case at bar is governed by Langford's case. It was not alleged in this petition, nor admitted in the plea, that the United States had ever in any way acknowledged any right of property in the plaintiff as against the United States. The plaintiff asserted a title in the land in question, with the exclusive right of building thereon, and claimed damages of the United States for the use and occupation of the land for a lighthouse. The United States positively and precisely pleaded that the land was submerged under the waters of Chesapeake Bay, one of the navigable waters of the United States, and that the United States, 'under the law, for the purpose of a lighthouse, has a paramount right to its use as against the plaintiff or any other person; and the plaintiff demurred to this plea. The Circuit Court, instead of rendering judgment for the United States upon the demurrer, should have dismissed the suit for want of jurisdiction.'"

In this connection it should be borne in mind that the United States, in the case at bar, has simply filed a demurrer, which admits all the facts alleged in the petition. Among other facts expressly and specifically alleged in the petition, are that the Government of the United States either granted *in praesenti* or *in futuro*, or agreed to grant to the plaintiff the lands in question, and that by express congressional authority the Government had breached the terms of its grant and covenants, and that its officers and agents, in breaching said grant or covenant, acted in pursuance of authority conferred upon them by the Congress of the United States. That

the Government of the United States was well aware of complainant's rights, and for a long time specifically recognized them, there can be no doubt. Under the Act of June 28, 1898, referred to on page 42 of the complainant's petition, and commonly known as the Curtis Act, it is expressly provided "*that nothing herein contained should in any way affect any vested legal rights which had been theretofore granted by Act of Congress*". This was an express recognition of complainant's rights. And when, pursuant to the terms of this act, the Dawes Commission undertook the negotiation of agreements with the tribes for the allotment of the lands, your complainant's rights were recognized by the Dawes Commission and by the Indian tribes themselves. *The Dawes Commission, in their report for the year* 1897, *page* 40, *referred to at page* 41 *in complainant's petition, among other things, reported that a change in the tenure of the tribal property of the Indians had become an imperative and inevitable necessity, and that one serious objection to the scheme of allotment was the rights of your petitioner under the acts of July* 25 *and* 26, 1866, *granting to your petitioner the lands in question.*

Where there is a taking of property by the Government, in violation of the Fifth Amendment to the Constitution of the United States, of course it is not necessary that there should be a contract or a meeting of minds, because, in the exercise of the power of eminent domain, there never is any contract or meeting of minds, but the taking is *in invitum*. But it certainly cannot be true that a taking of property for public or legislative purposes by the Government of the United States can be termed an unequivocal tort, for which it is not liable, where the taking is authorized and sane-

tioned by the Congress of the United States, even though in such a case the United States should make the claim, or some of its agents or attorneys should make the claim, that the property taken was in fact the property of the United States. By the Fifth Amendment to the Constitution of the United States, the United States agree that when property of the citizen is taken that just compensation shall be made, and when it takes property it cannot evade responsibility for compensation by simply asserting or claiming, or by some one on its part making the claim, that the property was not the property of an individual. The question of title in such a case is not one to be decided either by the party complainant or by the legislative or executive departments of the United States. This is a judicial question. Accordingly, if in a given case it is either admitted or proposed to be shown that the property concerned belongs to a party, before a court having jurisdiction to deal with the subject, then the only question that remains is whether such property has been taken by the United States for public use. In such a case the United States cannot by a plea, much less by demurrer denying the plaintiff's title, make it the duty of the court to dismiss the plaintiff's suit. But where it is shown or admitted, as in this case, by demurrer, that the United States, by law, has authorized its officers and agents to appropriate the property of complainant and ratified the action of their officers and agents in taking possession of the property and subjecting it to the public use, then the constitutional duty of the court is to pronounce judgment for the plaintiff, and to award it compensation. Because the United States, or rather because its attorneys, by their claims and assertions, deny the complainant's right to

recover, the acts of Congress relied upon are not thereby converted into sheer torts and therefore exempted from judicial cognizance. The Tucker Act provides that all claims founded upon provisions of the Constitution shall be enforcible. Surely it is not competent, therefore, for the attorneys of the United States, by simply denying the plaintiff's allegations or demurring thereto, as in the case at bar, to deprive the plaintiff of its rights under the statute to have its claim adjudicated and exonerate the United States from its duty of making compensation. Is it possible that after Congress has thus given express recognition of the constitutional provision here relied upon, that an attorney of the United States can, by demurrer or by plea, defeat the purpose of Congress and deprive the plaintiff of his remedy and convert the United States, against their will as expressed in the Constitution and the acts of Congress, into a mere wrongdoer?

Probably this review of the Langford and Hill cases was unnecessary. At least the Court of Claims adopted our views with respect thereto and even Judge Howry, in his concurring opinion, concluded they could not be twisted into supporting the contentions of the Government.

ELEVENTH.

The acts and doings of the United States through acts of Congress and executive action thereunder since the stated acts of Congress of 1866 were passed, whereby such latter acts, treated as laws, were in legal effect annulled, and considered as a contract were in legal effect repudiated.

The movement of the United States toward the extinguishment of the Indian title and the allotment and

sale in severalty of the Indian lands in the Indian Territory, was begun, as shown in the Petition, under Sections 15 and 16, Chapter 209, of the Indian Appropriation Act, of March 3, 1893 (R., p. 37).

By Section 15 the consent of the United States was given to the allotment of the lands in severalty within the limits of the country occupied by the Five Civilized Tribes, and provided that upon such allotments the allottees should be deemed in all respects citizens of the United States. By this section money was appropriated for the survey of the lands which were to be allotted, and upon the allotment of the lands held by the said tribes respectively, *it was provided the reversionary interest of the United States should be relinquished and cease.*

Section 16 provided for the appointment of the Dawes Commission, for the purpose of entering into negotiations with the Five Civilized Tribes for the purpose of the extinguishment of the Indian national or tribal title to such lands, of any or all such nations or tribes, either by cession of the same or some part thereof, to the United States, or by the allotment and division of the same in severalty among the Indians, or by such other method as might be agreed upon between such nations or tribes and the United States, with the view to such an adjustment, on the basis of justice and equity to the Indians, as might be requisite and suitable to the creation of a State or States of the Union which should embrace the lands within said Territory. And Section 16 further provided that neither the provisions of the section nor the negotiations or agreements which might be had or made thereunder, should be held in any way to waive or impair any right of sovereignty which the Government of the

United States had over the Territory or the people thereof, or any right of the Government relating to said Territory, its lands, or the people thereof.

The plain purpose, therefore, of Congress, was to extinguish the Indian title, make the Indians citizens of the United States and the Territory a State of the Union. These were the objects which the Government had in view. The fault of this scheme, and of the proceedings which followed, and the subsequent extinguishment of the Indian national or tribal title, and the sale and division of the lands by allotment among the Indians and making the Indians citizens of the United States, was that it utterly ignored the grant to the railway company, which had been earned by the company and by which the company had acquired a vested interest therein. At the time of the passage of these laws initiating the proceedings for extinguishing the Indian title, the title to the Indian lands, was in the railway company, as the grantee of the reversionary interest of the United States, and in the Indian nations. The United States cannot say, in the face of these statutes, that there was no reversionary interest in the United States, and that the lands, under the former treaties with the Indians, belonged to the Indians. The declaration of these acts is, that the United States had a reversionary interest in the lands, and that they and the Indian nations owned the lands. The dealing with the lands, in which the railway company, as the grantee of the United States, had such a manifest and important interest, without the consent and against the protest of the railway company, was an appropriation of the grant of the railway company, and a breach of the covenants of the grant, for which the United States is liable in damages.

In the Annual Report of the Dawes Commission for the fiscal year ending June 30, 1903, in a review of the legislation leading up to the dissolution of the Five Civilized Tribes and the allotment of land in the Indian Territory, the Commission said:

> "*The object of Congress from the beginning has been the dissolution of the tribal governments, the extinguishment of the communal or tribal title to the land, the vesting of possession and title in severalty among the citizens of the tribes, and the assimilation of the peoples and institutions of this Territory to our prevailing American standard.*
>
> "It was evident at the end of the first five years that the accomplishment of the foregoing object by negotiation alone was practically impossible. The Indians (so-called, for most of them by a century and a quarter of intermarriage have far more Saxon than Indian blood), would never surrender by consent what they did not want to give up at all. The Commission, as then constituted, was able to bring to the discussion neither inducements nor force. Some of the tribal members held passionately to their institutions from custom and patriotism, and others held with equal tenacity because of the advantages and privileges they enjoyed. It was almost worth a man's life at that time to advocate a change.
>
> "Under these conditions Congress was in 1898 fairly confronted with the alternative of either abandoning its policy and abolishing the Commission, or else of converting the Commission from merely a negotiating body into also an executive and semi-judicial body, and of proceeding with the work under the constitutional power of Congress, and largely, at least, regardless of the will of the tribes.
>
> "A strenuous effort was made to prevent the

adoption of the latter course. So pronounced was the opposition and so severe were the criticisms heaped upon the Commission that at one time there seemed to be no doubt of success for those who favored this policy. But in what may be deemed a fortunate hour it was decided not to act without giving a chance to the special representatives of the Government to be heard, both in their own defense and with respect to what course should be adopted. This led to such a revelation of slander, corruption and oppression that Congress immediately passed the Curtis Act, and it has been followed by prompt appropriations for its execution, amounting now to nearly $1,000,000.

"That act undertook, not to let anybody and everybody come forward and take public land, but to administer upon five great estates, aggregating 20,000,000 acres. It ordered these estates to be partitioned among the individual heirs upon the principle of equal value; and it could hardly have done less, and at our expense, under the stipulations of treaties.

"Nor was it a disposition of wild lands, or of lands of uniform value. It related to vast tracts, covered by the homes and other improvements of a great population, threaded in every direction with railroads, filled with villages and large towns of the most modern character, and without a wigwam or a blanket Indian within the limits of the Territory."

And, in the same report, the Commission said:

"The survey and appraisement work of the Commission is finished. Actual field work was discontinued on January 31, 1903. It was expected to disband the seven survey parties which the Commission had in the field at the close of the calendar year 1902, but the work was retarded by

excessive rains, necessitating the retention of five of these field parties during January of the present year."

In this connection, we respectfully request the Court to read the allegations of the Petition commencing at page 39, showing that the executory conditions upon which the communal rights of the several Indian tribes were based had not been performed by the Indians, and were impossible of execution.

By act of March 3, 1871, now Section 2079 of the Revised Statutes of the United States, it is provided that no Indian nation or tribe, within the territory of the United States, shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract by treaty. The whole scheme of dissolving the Indian tribes as nations and of citizenizing the individual Indians and allotting the lands, and making the Indian Nation a State of the Union has been carried forward by the United States under and pursuant to Acts of Congress. It is true that some of these acts contain certain agreements with the tribes, but all of the acts, including the agreements, operated and could operate, only as laws of the United States, and all the agreements or treaties with the Indian nations or tribes were incorporated into Acts of Congress.

While Section 11 of the Curtis Act provided for the allotment only of the exclusive use and occupancy of the surface of all the lands of the Indian tribes among the citizens thereof, and provided that nothing therein contained should in any way affect any vested legal rights which had been theretofore granted by Congress, subsequently, by the Acts of Congress, the Indian title to the railroad company's granted lands was

extinguished and the lands themselves were divided among allottees and sold to purchasers, the Congress and the executive department of the United States intending thereby to grant to the individual Indians and purchasers the entire title to said lands, including that of the United States, the communal possessory rights of the Indian nations or tribes, and the remainder or reversionary estate of the railroad company. By thus changing its purpose as expressed in the Curtis Act, and patenting the lands to the allottees and purchasers, the United States broke the covenants of its land grant to the railroad company, to its great damage (Pet. R., pp. 42, 43, 45 and 46).

The Indian title to the lands in the Indian Territory which are the subject of this suit, has been extinguished. All the legislation of Congress, beginning with the Act of Congress of March 3, 1893, creating the Dawes Commission, and subsequent treaties, show this beond question. Section 16 of the act (Pet., p. 37), expressly shows that the Commissioners were appointed to enter into negotiations for the purpose of extinguishing the national or tribal title to the lands within the Indian Territory, and that this extinguishment was to be either by cession or by allotment, or by both. The object of the extinguishment of the Indian title was to create a State or States of the Union embracing the lands within the Indian Territory. The lands were authorized to be surveyed by Section 15 of this act, and it was provided that when allotments were made to individual Indians, they should be deemed in all respects to be citizens of the United States. The final deeds of allotment to the Indians, and deeds to the townsite purchasers, as shown by Exhibits 36, 37, 38, 39, 40 and 41 (R., pp. 631-651)

show that the Indian title was extinguished and conveyed to the individual allottee and purchaser, and all the interest of the United States was conveyed. It was intended thereby to create a new title in the allottees and townsite purchasers, conveying all the interest of the United States, of the Indian tribes, and of the individual Indians to the allottees of the lands and the purchasers of the townsite lands. The United States put these allottees and purchasers into possession, refused to reserve the lands granted to the railroad company from allotment, and thereby violated its grant and contract with the railroad company.

In the Acts of Congress and agreements with the Indians providing for the allotment of the lands, the declared purpose of the United States to vest the fee-simple title to the lands in the allottees, is clearly shown.

The Act of Congress of March 1, 1901, ratifying the agreement with the Muskogee or Creek tribe (Exhibit 13, R., p. 255) provided:

> "The Secretary of the Interior shall, through the United States Indian Agent in said Territory, immediately after the ratification of this agreement, put each citizen who has made selection of his allotment in unrestricted possession of his land and remove therefrom all persons objectionable to him; and when any citizen shall thereafter make selection of his allotment as herein provided, and receive certificate therefor, he shall be immediately thereupon so placed in possession of his land."

The Act of Congress of July 1, 1902, ratifying the Cherokee agreement (Exhibit 13, R., p. 330), provided:

> "Allotment certificates issued by the Dawes

> Commission shall be conclusive evidence of the right of an allottee to the tract of land described therein, and the United States Indian Agent for the Union Agency shall, under the direction of the Secretary of the Interior, upon the application of the allottee, place him in possession of his allotment, and shall remove therefrom all persons objectionable to him, *and the acts of the Indian agent hereunder shall not be controlled by the writ or process of any court.*"

The Act of Congress of July 1, 1902, ratifying the Choctaw and Chickasaw agreement (Exhibit 13, R., p. 296), provided:

> "Allotment certificates issued by the Commission to the Five Civilized Tribes shall be conclusive evidence of the right of any allottee to the tract of land described therein; and the United States Indian Agent at the Union Agency shall, upon the application of the allottee, place him in possession of his allotment, and shall remove therefrom all persons objectionable to such allottee, *and the acts of the Indian agent hereunder shall not be controlled by the writ or process of any court.*"

The Curtis Act ratifying and approving the "Atoka Agreement" with the Choctaw and Chickasaw tribes (Exhibit 13, R., p. 224) provides:

> "That the United States shall put each allottee in possession of his allotment, and remove all persons therefrom objectionable to the allottee."

The Act of Congress of March 1, 1901, ratifying the agreement with the Muskogee or Creek tribe (Exhibit 13, R., pp. 263-264), provides:

"Immediately after the ratification of this agreement by Congress and the tribe the Secretary of the Interior shall furnish the principal chief with blank deeds necessary for all conveyances herein provided for, and the principal chief shall thereupon proceed to execute in due form and deliver to each citizen who has selected or may hereafter select his allotment, which is not contested, *a deed conveying to him all right, title and interest of the Creek Nation and of all other citizens in and to the lands embraced in his allotment certificate*, and such other lands as may have been selected by him for equalization of his allotment.

"The principal chief shall, in like manner and with like effect, execute and deliver to proper parties deeds of conveyance in all other cases herein provided for. All lands or town lots to be conveyed to any one person shall, so far as practicable, be included in one deed, and all deeds shall be executed free of charge.

"*All conveyances shall be approved by the Secretary of the Interior, which shall serve as a relinquishment to the grantee of all the right, title and interest of the United States in and to the lands embraced in his deed.*

"*Any allottee accepting* such deed shall be *deemed to assent to the allotment and conveyance of all the lands of the tribe, as provided herein, and as a relinquishment of all his right, title and interest in and to the same, except in the proceeds* of lands reserved from allotment.

"The acceptance of deeds for minors and incompetents by persons authorized to select their allotments for them, shall be deemed sufficient to bind such minors and incompetents to allotment and conveyance of all other lands of the tribe, as provided herein.

"The transfer of the title of the Creek tribe to

individual allottees and to other persons, as provided in this agreement, shall not inure to the benefit of any railroad company, nor vest in any railroad company any right, title, or interest in or to any of the lands in the Creek Nation."

The Act of Congress of July 1, 1902, ratifying the Cherokee agreement (Exhibit 13, R., 345, 346), provides:

"The Secretary of the Interior shall furnish the principal chief with blank patents necessary for all conveyances herein provided for, and when any citizen receives his allotment of land, or when any allotment has been so ascertained and fixed that title should under the provisions of this act be conveyed, the principal chief shall thereupon proceed to execute and deliver to *him a patent conveying all the right, title and interest of the Cherokee Nation, and of all other citizens in and to the lands embraced in his allotment certificate.*

"All conveyances shall be approved by the *Secretary of the Interior, which shall serve as a relinquishment to the grantee of all the right, title and interest of the United States in and to the lands embraced in his patent.*

"*Any allottee* accepting such patent *shall be deemed to assent to the allotment and conveyance of all lands of the tribe as provided in this act*, and to *relinquish all his right*, title and interest to the same, except in the proceeds of lands reserved from allotment.

"The acceptance of patents for minors and incompetents by persons authorized to select their allotments for them shall be deemed sufficient to bind such minors and incompetents as to the conveyance of all other lands of the tribe."

The Curtis Act, ratifying the "Atoka Agreement" with the Choctaw and Chickasaw Indians (Exhibit 13, R., pp. 224, 225), provides:

> "That, as soon as practicable after the completion of said allotments, the principal chief of the Choctaw Nation and the Governor of the Chickasaw Nation shall jointly execute, under their hands and the seals of the respective nations, and deliver to each of the said allottees *patents conveying to him all the right, title and interest of the Choctaws and Chickasaws in and to the land which shall have been allotted to him* in conformity with the requirements of this agreement, excepting all coal and asphalt in or under said land. Said patents shall be framed in accordance with the provisions of this agreement and shall embrace the land allotted to such patentee and no other land, and *the acceptance of his patents* by such *allottee* shall be *operative as an assent on his part to the allotment and conveyance of all the lands of the Choctaws and Chickasaws*, in accordance with the provisions of this agreement, *and as a relinquishment of all his right, title and interest in and to any and all parts thereof*, except the land embraced in said patents, except also his interest in the proceeds of all lands, coal, and asphalt herein excepted from allotment.
>
> "That the United States shall provide by law for proper record of land titles in the territory occupied by the Choctaw and Chickasaw tribes."

The Act of Congress of July 1, 1902, ratifying the supplemental agreement with the Choctaw and Chickasaw tribes (Exhibit 13, R., p. 322), provides:

> "The acceptance of patents for minors, prisoners, convicts and incompetents by persons author-

ized to select their allotments for them shall be sufficient to bind such minors, prisoners, convicts and incompetents as to the conveyance of all other lands of the tribes."

The Act of Congress of April 26th, 1906, providing for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes (R., pp. 370-371), provides:

"That all patents or deeds to allottees in any of the Five Civilized Tribes to be hereafter issued shall issue in the name of the allottee, and if any such allottee shall die before such patent or deed becomes effective, the title to the lands described therein shall inure to and vest in his heirs, and in case any allottee shall die after restrictions have been removed, his property shall descend to his heirs or his lawful assigns, as if the patent or deed had issued to the allottee during his life, and all patents heretofore issued where the allottee died before the same became effective, shall be given like effect; and all patents or deeds of allottees and other conveyances affecting lands of any of said tribes shall be recorded in the office of the Commissioner to the Five Civilized Tribes, *and when so recorded shall convey legal title*, and shall be delivered under the direction of the Secretary of the Interior to the party entitled to receive the same: *Provided*, The provisions of this section shall not affect any rights involved in contests pending before the Commissioner to the Five Civilized Tribes or the Department of the Interior at the date of the approval of this Act.

"*That if the principal chief of the Choctaw, Cherokee, Creek, or Seminole tribe, or the governor of the Chickasaw tribe shall refuse or neglect to perform the duties devolving upon him, he*

may be removed from office by the President of the United States, or if any such executive become permanently disabled, the office may be declared vacant by the President of the United States, who may fill any vacancy arising from removal, disability or death of the incumbent, by appointment of a citizen by blood of the tribe.

"If any such executive shall fail, refuse or neglect, for thirty days after notice that any instrument is ready for his signature, to appear at a place to be designated by the Secretary of the Interior and execute the same, such instrument may be approved by the Secretary of the Interior without such execution, and when so approved and recorded shall convey legal title, and such approval shall be conclusive evidence that such executive or chief refused or neglected after notice to execute such instrument."

Section 11 of the "Curtis Act", provided that when the roll of citizenship of the Five Civilized Tribes should be completed, the Dawes Commission should proceed to "allot the exclusive use and occupancy of the surface of the lands of said nation or tribe susceptible of allotment, among the citizens thereof" (R., p. 201).

It was provided in the same section of this act:

> "That the lands allotted shall be non-transferable until after *full title* is acquired. * * *" (R., p. 203).

But no provision was made in the Curtis Act for the acquisition by the allottees of the full title. Section 12 of the act provides (R., p. 203):

> "That when report of allotments of lands of any tribe shall be made to the Secretary of the

> Interior, as hereinbefore provided, he shall make a record thereof, and when he shall confirm such allotments the allottees shall remain in peaceable and undisturbed pos-ession thereof, subject to the provisions of this act."

As will be seen, however, from the various agreements which were negotiated by the Dawes Commission with the several Indian tribes, and which were ratified and approved by the several acts of Congress referred to, provi-ion was made not only for the allotment of the exclusive use and occupancy of the surface, but for the conveyance to the several Indians, as citizens of the United States, of the *fee-simple* title to the lands allotted.

The Act of Congress of April 26th, 1906, passed after most of the allotments were made, providing for the final disposition of the affairs of the Five Civilized Tribes (Book of Exhibits, R., pp. 390-391), provides:

> "That the lands belonging to the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes, upon the dissolution of said tribes, shall not become public lands nor property of the United States, but shall be held in trust by the United States for the u-e and benefit of the Indians respectively comprising each of said tribes, and their heirs as the same shall appear by the rolls as finally concluded as heretofore and hereinafter provided for: *Provided*, That nothing herein contained shall interfere with any allotments heretofore or hereafter made or to be made under the provisions of this or any other Act of Congress.
>
> "That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek and Seminole tribes or nations are hereby continued in full force and effect for all

purposes authorized by law, until otherwise provided by law, but the tribal council or legislature in any of said tribes or nations shall not be in session for a longer period than thirty days in any one year: *Provided*, That no act, ordinance or resolution (except resolutions of adjournment) of the tribal council or legislature of any of said tribes or nations shall be of any validity until approved by the President of the United States: *Provided further*, That no contract involving the payment or expenditure of any money or affecting any property belonging to any of said tribes or nations made by them or any of them or by any officer thereof, shall be of any validity until approved by the President of the United States."

That it was the purpose of the Government to invest individual Indians, not as members of Indian tribes, but as citizens of the United States with an entirely different estate and title, is conclusively shown by the various acts of Congress, in that the lands are made inheritable and pass by descent, are subject to alienation, and to disposition by will and testament. None of these rights or estates existed in the individual Indians under the old treaties and patents to the tribes.

In *Stephens v. Cherokee Nation*, *Choctaw Nation v. Robinson*, *Johnson v. Creek Nation* and *Chickasaw Nation v. Robinson*, 174 U. S. 445, this Court exhaustively considered the nature of the title of these tribes to the lands in the Indian Territory, and the constitutionality of the legislation looking to the extinguishment of the national or tribal title and the allotment thereof in severalty. Included in the statement of the case are extracts from a Report of the Senate Committee of the Fifty-second Congress, showing the circumstances

under which these tribes were located in the Indian Territory, the nature of their title, etc. The statement of the case also included extracts from the reports of the Dawes Commission upon the condition of affairs in the Indian Territory. Both the Senate Report and the reports of the Dawes Commission showed that the several tribes of Indians had violated their several treaties and breached the trust upon which the lands were patented to the several tribes, and that a restoration of the treaty status was an impossibility. The paramount question decided in these cases was that the acts of Congress looking to the preparation of rolls of citizens of the several tribes, and the allotment of the lands, were constitutional as against claims on the part of the individual Indians that no right or title to the lands remained in the Government under which it could make the distribution or allotment of the lands. The Court cited with approval the case of the *United States v. Kagama*, 118 U. S. 375, to the effect "that the Indians were within the geographical limits of the United States", and that "the soil and the people within these limits are under the political control of the Government of the United States or the States of the Union". The Court further said (pp. 486, 488-489):

> "Such being the position occupied by these tribes (and it has often been availed of to their advantage), and the power of Congress in the premises having the plenitude thus indicated, we are unable to perceive that the legislation in question is in contravention of the Constitution.
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> * * * * * * * *
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> "We repeat that in view of the paramount authority of Congress over the Indian tribes, and of the duties imposed on the Government by their

condition of dependency, we cannot say that Congress could not empower the Dawes Commission to determine, in the manner provided, who were entitled to citizenship in each of the tribes and make out correct rolls of such citizens, an essential preliminary to effective action in promotion of the best interests of the tribes. It may be remarked that the legislation seems to recognize, especially the Act of June 28, 1898, a distinction between admission to citizenship merely and the distribution of property to be subsequently made, as if there might be circumstances under which the right to a share in the latter would not necessarily follow from the concession of the former. But in any aspect, we are of opinion that the constitutionality of these acts in respect of the determination of citizenship cannot be successfully assailed on the ground of the impairment or destruction of vested rights. The lands and moneys of these tribes are public lands and public moneys, and are not held in individual ownership, and the assertion by any particular applicant that his right therein is so vested as to preclude inquiry into his status involves a contradiction in terms.

"The judgments in these cases were rendered before the passage of the Act of June 28, 1898, commonly known as the Curtis Act, and necessarily the effect of that act was not considered. As, however, the provision for an appeal to this court was made after the passage of the act, some observations upon it are required, and, indeed, the inference is not unreasonable that a principal object intended to be secured by an appeal was the testing of the constitutionality of this act, and that may have had controlling weight in inducing the granting of the right to such appeal."

In *Cherokee Nation v. Journeycake*, 155 U. S. 196,

the Court had occasion to inquire into the nature of the tenure of the Cherokees to their lands in the Indian Territory. In the opinion the various treaties between the United States and the Cherokee Nation are referred to, as well as the patent which was issued to the Cherokees.

The Court held that "whatever of title" was conveyed was conveyed to the Cherokees as a nation, and that no title vested in severalty in the Cherokees or any of them. And further held that while under the agreement with the Delawares, the Delaware Indians became incorporated into the Cherokee Nation, with the same rights as native Cherokees, and notwithstanding the Delawares were to pay for their homes in the Cherokee Nation "at the rate of a dollar an acre", that they "acquired no title in fee-simple" (*l. c.* 214). And the Court further held that by such purchase on the part of the Delawares, they not only acquired their homes, but "an interest in the entire body of lands (of the Cherokees) that interest being, like that of the Cherokees, limited to a mere occupancy of the tracts set apart for homes."

In *Choctaw and Chickasaw Nations v. United States and the Wichita and Affiliated Bands of Indians*, 34 Ct. Cl. 17, the Court said, at page 88, upon the question of the nature of the Choctaw and Chickasaw title to their lands under the various treaties and the patent issued:

> "The character of the titles obtained by the Indians under these treaties have never been questioned. The lands conveyed to the Indians were qualified as to the fee in more or less degree, while those given in exchange to the United States by

the Indians generally conveyed whatever rights of occupancy the Indians had."

And at pages 128-130 the Court said:

"The first grant of lands from the United States, which included those in controversy, was made to the Choctaw Nation (Treaty of 1820, Art. 2). Under the provisions of the treaty of 1830 and of the patent thereunder, title was vested in 'the Choctaw Nation' and their descendants in fee-simple, to inure to them while they shall exist as a nation and live upon it (Treaty of 1830, Art. 2). The treaty of 1855, by its first article, provided:

"'And pursuant to an act of Congress approved May 28, 1830, the United States do hereby forever secure and guarantee the lands embraced within the said limits to the members of the Choctaw and Chickasaw tribes, their heirs and successors, to be held in common, so that each and every member of either tribe shall have an equal undivided interest in the whole: *Provided*, however, No part thereof shall ever be sold without the consent of both tribes, and that said land shall revert to the United States if said Indians and their heirs become extinct or abandon the same' (11 Stat. L., p. 612).

"This guaranty, being pursuant to the Act of May 28, 1830 (4 Stat. L., p. 411), must necessarily be such a guaranty as that act authorized in the following section:

"'Sec. 3. And be it further enacted, That in the making of any such exchange or exchanges it shall and may be lawful for the President solemnly to assure the tribe or nation with which the exchange was made that the United States will forever secure and guarantee to them, and their

heirs and successors, the country so exchanged with them; and, if they prefer it, the United States will cause a patent or grant to be made and executed to them for the same: *Provided, always*, That such lands shall revert to the United States if the Indians become extinct or abandon the same.'

"It was not the object of the treaty of 1855 to recognize rights of private ownership or change the nature of the Indian title of occupancy into one of different character. That treaty on its face shows it was in settlement of the claims of the Chickasaws as against the Choctaws, and the lands covered by the guaranty were to be held in common thereafter by the two tribes instead of one; that is, each member of each tribe was to have the same rights in the country of the two nations that the members of one tribe formerly had under the treaty of 1830, before the convention of 1837 between the two nations. The guaranty was intended to secure to two tribes in common what one tribe had before then enjoyed to itself alone. The land continued to be tribal land after this treaty as much as it had been before, in the sense that when it again became the subject of treaty with the United States the nations could only deal with it, and when they ceded it, such cession by them extinguished the claims of the members absolutely.

"The nature of the Indian holding was something like the base or qualified fee defined to be such a one as hath a qualification subjoined thereto, and which must be determined whenever the qualification annexed to it is at an end (2 Blacks., p. 109). Defining a qualified base or determinable fee, Chancellor Kent says it is an interest which may continue forever, but the estate is liable to be determined, without the aid of a

conveyance, by some act or event circumscribing its continuance or extent.' It is the uncertainty of the event and the possibility that the fee may last forever that renders the estate a fee and not merely a freehold. If the condition attached to the fee is one which is certain to happen, then there is a reversion. If such condition is one which may never happen, there is not a reversion, but only a possibility of a reversion (4 Kent Com., p. 9; 1 Washburn on Real Prop., p. 90).

"The individuals of these nations had no such estate by any treaty as upon the death of any member descended to his immediate heirs. The land was communal property, which upon the death of any member descended, as to his interest, to all the surviving members of the tribe alike.

"The United States already had sovereignty over the land, subject to the uses of the two nations under the treaties. If by Article 3 of the last treaty the nations made an absolute cession, the act of the body politic disposed of whatever private interest the members had in the land, as well as the dominion of the tribes in their corporate capacity.

"Subtle and plausible as the argument seems to be as a piece of judicial literature, it is not tenable upon its merits. As the controversy here does not relate to the character of the title as between the members and the nations in their corporate capacity, we could not entertain claims of private ownership on the merits if established."

In *Cherokee Nation v. Hitchcock*, 187 U. S. 294, the Cherokee Nation and its principal chief and treasurer, and sundry other citizens of that nation, suing on behalf of themselves and of the citizens of the nation, sought an injunction restraining Hitchcock, as Secretary of the Interior, from executing leases covering

certain lands in the Cherokee Nation, as to which it was claimed in the bill that the Cherokee Nation was vested with the fee-simple title under the various Cherokee treaties and the patent issued to the Cherokee tribe. The case involved the constitutionality of the act of June 28, 1898, known as the Curtis Act, which provided for the general disposition of the lands in the Indian Territory.

Mr. Justice (now Chief Justice) White, before considering the provisions of the Act of June 28, 1898, said it was necessary to consider the antecedent legislation, and in that connection referred to the case of Stephens v. Cherokee Nation, 174 U. S. 445, where the Act of March 3, 1893, authorizing the President to appoint Commissioners to enter into negotiations with the Cherokee, Choctaw, Chickasaw, Creek and Seminole Nations for the purpose of extinguishing the national or tribal title, was fully considered. Mr. Justice White further referred to the reports of the Dawes Commission on the prevailing conditions in the Indian Territory, as well as the report of the Senate Committee, of date May 7, 1894, as showing an existence of affairs in the Indian Territory "abhorrent to the spirit of our institutions", and the necessity of the assumption by the United States of "responsibility for future conditions in the Territory and the need of independent legislation by Congress in that behalf". He quoted the following from the above named Senate Report (p. 302):

"As we have said, the title to these lands is held by the tribe in trust for the people. We have shown that this trust is not being properly executed, nor will it be if left to the Indians, and the question arises, What is the duty of the Govern-

ment of the United States with reference to this trust? While we have recognized these tribes as dependent nations, the Government has likewise recognized its guardianship over the Indians and its obligations to protect them in their property and personal rights.

"In the treaty with the Cherokees, made in 1846, we stipulated that they should pass laws for equal protection and for the security of life, liberty and property. If the tribe fails to administer its trust properly by securing to all the people of the tribe equitable participation in the common property of the tribe, there appears to be no redress for the Indian so deprived of his rights unless the Government does interfere to administer such trust."

Mr. Justice White held (p. 305) that the Act of March 3, 1871 (16 Stat., p. 544), now Section 2079 of the Revised Statutes, "voiced the intention of Congress thereafter to make the Indian tribes amenable directly to the power and authority of the laws of the United States by the immediate exercise of its legislative power over them". And further held (pp. 306-307):

"It results then from the doctrine of the decisions of this court that the demurrer was properly sustained, because of the fact that the matters named in the bill were matters of administration, to which the Act of June 28 was applicable, and they were solely cognizable by the executive department of the Government. The decision in *Stephens v. Cherokee Nation*, 174 U. S. 445, is particularly in point, as that case involved the validity of the very act under consideration, and the precedent correlative legislation, wherein the United States practically assumed the full con-

trol over the Cherokees as well as the other nations constituting the Five Civilized Tribes, and took upon itself the determination of membership in the tribes for the purpose of adjusting their rights in the tribal property. The plenary power of control by Congress over the Indian tribes and its undoubted power to legislate, as it had done through the act of 1898, directly for the protection of the tribal property, was in that case reaffirmed. Thus, in the course of its opinion, after alluding to the legislation concerning the Dawes Commission, the Court said:

"'It may be remarked that the legislation seems to recognize, especially the Act of June 28, 1898, a distinction between admission to citizenship merely and the distribution of property to be subsequently made, as if there might be circumstances under which the right to a share in the latter would not necessarily follow from the concession of the former. But in any aspect, we are of opinion that the constitutionality of these acts in respect of the determination of citizenship cannot be successfully assailed on the ground of the impairment or destruction of vested rights. The lands and moneys of these tribes are public lands and public moneys, and are not held in individual ownership, and the assertion by any particular applicant that his right therein is so vested as to preclude inquiry into his status involves a contradiction in terms.'

"The holding that Congress had power to provide a method for determining membership in the Five Civilized Tribes, and for ascertaining the citizenship thereof preliminary to a division of the property of the tribe among its members, necessarily involved the further holding that Congress was vested with authority to adopt measures to make the tribal property productive, and

secure therefrom an income for the benefit of the tribe.

"Whatever title the Indians have is in the tribe, and not in the individuals, although held by the tribes for the common use and equal benefit of all the members. *The Cherokee Trust Funds*, 117 U. S. 288, 308. The manner in which this land is held is described in *Cherokee Nation v. Journeycake*, 155 U. S. 196, 207, where this Court, referring to the treaties and the patent mentioned in the bill of complaint herein, said: 'Under these treaties, and in December, 1838, a patent was issued to the Cherokees for these lands. By that patent, whatever of title was conveyed was conveyed to the Cherokees as a nation, and no title was vested in severalty in the Cherokees, or any of them.'"

In *Lone Wolf v. Hitchcock*, 187 U. S. 553, a bill was filed by Lone Wolf, suing for himself as well as for all other members of the confederated tribes of Kiowa, Comanche and Apache Indians residing in the Territory of Oklahoma. Subsequently, by amendment, members of the Kiowa, Comanche and Apache tribes were joined with Lone Wolf as parties complainant. The purpose of the bill was to restrain the distribution and allotment by the United States of the lands claimed by these tribes, for the reason that the tribes were vested with an interest in the lands, which interest could not be divested by Congress without violating the Fifth Amendment to the Constitution of the United States. Upon this proposition, the Court said (pp. 564-566, 567, 568):

"The contention in effect ignores the status of the contracting Indians and the relation of dependency they bore and continue to bear towards the Government of the United States. To uphold

the claim would be to adjudge that the indirect operation of the treaty was to materially limit and qualify the controlling authority of Congress in respect to the care and protection of the Indians, and to deprive Congress, in a possible emergency, when the necessity might be urgent for a partition and disposal of the tribal lands, of all power to act, if the assent of the Indians could not be obtained.

"Now, it is true that in decisions of this court the Indian right of occupancy of tribal lands, whether declared in a treaty or otherwise created, has been stated to be sacred, or, as sometimes expressed, as sacred as the fee of the United States in the same lands. *Johnson v. McIntosh* (1823), 8 Wheat. 543, 574; *Cherokee Nation v. Georgia* (1831), 5 Pet. 1, 48; *Worcester v. Georgia* (1832), 6 Pet. 515, 581; *United States v. Cook* (1873), 19 Wall. 591, 592; *Leavenworth, Etc., R. R. Co. v. United States* (1875), 92 U. S. 733, 755; *Beecher v. Wetherby* (1877), 95 U. S. 517, 525. But in none of these cases was there involved a controversy between Indians and the government respecting the power of Congress to administer the property of the Indians. The questions considered in the cases referred to, which either directly or indirectly had relation to the nature of the property rights of the Indians, concerned the character and extent of such rights as respected States or individuals. In one of the cited cases it was clearly pointed out that Congress possessed a paramount power over the property of the Indians, by reason of its exercise of guardianship over their interests, and that such authority might be implied, even though opposed to the strict letter of a treaty with the Indians. Thus, in *Beecher v. Wetherby*, 95 U. S. 517, discussing the claim that there had been a prior reservation of land by treaty, to the

use of a certain tribe of Indians, the Court said (p. 525):

"'But the right which the Indians held was only that of occupancy. The fee was in the United States, subject to that right, and could be transferred by them whenever they chose. The grantee, it is true, would take only the naked fee, and could not disturb the occupancy of the Indians; that occupancy could only be interfered with or determined by the United States. It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race. Be that as it may, the propriety or justice of their actions towards the Indians with respect to their lands is a question of governmental policy, and is not a matter open to discussion in a controversy between third parties, neither of whom derives title from the Indians.'

"Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government.

"Until the year 1871 the policy was pursued of dealing with the Indian tribes by means of treaties, and, of course, a moral obligation rested upon Congress to act in good faith in performing the stipulations entered into on its behalf. But, as with treaties made with foreign nations, *Chinese Exclusion Case*, 130 U. S. 581, 600, the legislative power might pass laws in conflict with treaties made with the Indians. *Thomas v. Gay*, 169 U. S. 264, 270; *Ward v. Race Horse*, 163 U. S. 504, 511; *Spalding v. Chandler*, 160 U. S. 394, 405; *Missouri, Kansas & Texas Ry. Co. v. Roberts*, 152 U. S. 114, 117; *The Cherokee Tobacco*, 11 Wall. 616.

"The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the Government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so. When, therefore, treaties were entered into between the United States and a tribe of Indians it was never doubted that the power to abrogate existed in Congress, and that in a contingency such power might be availed of from considerations of governmental policy, particularly if consistent with perfect good faith towards the Indians.

* * * * * * * *

"That Indians who had not been fully emancipated from the control and protection of the United States are subject, at least so far as the tribal lands were concerned, to be controlled by direct legislation of Congress, is also declared in *Choctaw Nation v. United States*, 119 U. S. 1, 27, and *Stephens v. Cherokee Nation*, 174 U. S. 445, 483.

* * * * * * * *

"Indeed, the controversy which this case presents is concluded by the decision in *Cherokee Nation v. Hitchcock*, 187 U. S. 294, decided at this term, where it was held that full administrative power was possessed by Congress over Indian tribal property. In effect, the action of Congress now complained of was but an exercise of such power, a mere change in the form of investment of Indian tribal property, the property of those who, as we have held, were in substantial effect the wards of the Government. We must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and that the legislative branch of the Gov-

ernment exercised its best judgment in the premises. In any event, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation. If injury was occasioned, which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought by an appeal to that body for redress and not to the courts. The legislation in question was constitutional, and the demurrer to the bill was therefore rightly sustained."

Blackstone defines a fee as follows (Bl. Com., Bk. 2, Ch. 7, p. 106):

"A *fee*, therefore, in general, signifies an estate of inheritance; being the highest and most extensive interest that a man can have in a feud; and when the term is used simply, without any other adjunct, or has the adjunct of *simple* annexed to it (as a fee or a fee-simple), it is used in contradistinction to a fee conditional at the common law, or a fee-tail by the statute; importing an absolute inheritance, clear of any condition, limitation, or restrictions to particular heirs, but descendable to the heirs general whether male or female, lineal or collateral. And in no other sense than this is the king said to be seized in *fee*, he being the feudatory of no man."

From which it is apparent that the tribal title, whatever it may be determined to be, is not a fee simple title, because lacking the attributes of a fee-simple title.

This author also defines a base or qualified fee as (p. 109):

"Such a one as hath a qualification subjoined

thereto, and which must be determined whenever the qualification annexed to it is at an end. As, in the case of a grant to A and his heirs, *tenants of the manor of Dale;* in this instance, whenever the heirs of A cease to be tenants of that manor, the grant is entirely defeated. So when Henry VI granted to John Talbot, Lord of the manor of Kingston-Lisle in Berks, that he and his heirs, lords of the said manor, should be peers of the realm, by the title of barons of Lisle; here John Talbot had a base or qualified fee in that dignity, and, the instant he or his heirs quitted the seignory of this manor, the dignity was at an end."

Under all the Indian treaties, and the patents issued to the several tribes, the estate, whatever it may be determined to be, was one of limitation, and not upon a condition. And when these tribes ceased to exist as tribes, and to live upon the lands as tribes, their right and title to the lands expired by limitation, and the right of possession to the lands immediately attached to the appellant as the grantee of the reversionary estate in the Government.

Upon the distinction between a condition in a deed, and a limitation, Blackstone says (Bk. 2, Ch. X, pp. 155-156):

"A distinction is, however, made between a *condition in deed* and a *limitation*, which Littleton denominates also a *condition in law*. For when an estate is so expressly confined and limited by the words of its creation, that it cannot endure for any longer time than till the contingency happens upon which the estate is to fail, this is denominated a *limitation*: as when land is granted to a man *so long as* he is parson of Dale, or *while* he continues unmarried, or *until* out of the rents and profits he

shall have made 500£, and the like. In such case the estate determines as soon as the contingency happens (when he ceases to be parson, marries a wife, or has received the 500£), and the next subsequent estate, which depends upon such determination, becomes immediately vested, without any act to be done by him who is next in expectancy. But when an estate is, strictly speaking, upon *condition in deed* (as if granted expressly *upon condition* to be void upon the payment of 40£ by the grantor, or so *that the* grantee continues unmarried, or *provided* he goes to York, etc.), the law permits it to endure beyond the time when such contingency happens, unless the grantor or his heirs or assigns take advantage of the breach of the condition, and make either an entry or a claim in order to avoid the estate. Yet, though strict words of condition be used in the creation of the estate, if on breach of the condition the estate be limited over to a third person, and does not immediately revert to the grantor or his representatives (as if an estate be granted by A to B, on condition that within two years B intermarry with C, and on failure thereof then to D and his heirs), this the law construes to be a limitation and not a condition: because if it were a condition, then, upon the breach thereof, only A or his representatives could avoid the estate by entry, and so D's remainder might be defeated by their neglecting to enter; but, when it is a limitation, the estate of B determines, and that of D commences, and he may enter on the lands the instant that the failure happens. So also, if a man by his will devises land to his heir at law, on condition that he pays a sum of money, and for nonpayment devises it over, this shall be considered as a limitation; otherwise no advantage could be taken of the non-payment, for none but the heir

himself could have entered for a breach of condition.

"In all these instances, of limitations or conditions subsequent, it is to be observed that so long as the condition, either express or implied, either in deed or in law, remains unbroken, the grantee may have an estate of freehold, provided the estate upon which such condition is annexed be in itself of a freehold nature; as if the original grant express either an estate of inheritance, or for life; or no estate at all, which is constructively an estate for life. For, the breach of these conditions being contingent and uncertain, this uncertainty preserves the freehold, because the estate is capable to last forever, or at least for the life of the tenant, supposing the condition to remain unbroken. But where the estate is at the utmost a chattel interest, which must determine at a time certain, and may determine sooner (as a grant for ninety-nine years, provided A, B and C, or the survivor of them, shall so long live), this still continues a mere chattel, and is not, by such its uncertainty ranked among estates of freehold."

Under the various treaties and patents to the tribes, the Government retained an estate of remainder, or a reversionary estate, which it granted to your petitioner. Upon the subject of reversionary estates, Black-tone says (Chap. 11, Bk. 2, pp. 175-178):

"An estate in *reversion* is the residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him. Sir Edward Coke describes a reversion to be the returning of land to the grantor or his heirs after the grant is over. As, if there be a gift in tail, the reversion of the fee is, without any special reservation, vested in

the donor by act of law and so also the reversion, after an estate for life, years, or at will, continues in the lessor. For the fee-simple of all lands must abide somewhere; and if he, who was before possessed of the whole, carves out of it any smaller estate, and grants it away, whatever is not so granted remains in him. A reversion is never therefore created by deed, or writing, but arises from construction of law; a remainder can never be limited, unless by either deed or devise. But both are equally transferable, when actually vested, being both estates *in præsenti*, though taking effect *in futuro*.

"The doctrine of reversions is plainly derived from the feudal constitution. For when a feud was granted to a man for life, or to him and his issue male, rendering either rent or other services; then, on his death or the failure of issue male, the feud was determined, and resulted back to the lord or proprietor, to be again disposed of at his pleasure. And hence the usual *incidents* to reversions are said to be *fealty* and *rent*. When no rent is reserved on the particular estate, fealty, however, results of course as an incident quite inseparable, and may be demanded as a badge of tenure, or acknowledgment of superiority; being frequently the only evidence that the lands are holden at all. Where rent is reserved, it is also incident, though not inseparably so, to the reversion. The rent may be granted away, reserving the reversion; and the reversion may be granted away, reserving the rent; by *special* words; but by a *general* grant of the reversion, the rent will pass with it, as incident thereunto; though by the grant of the rent generally, the reversion will not pass. The incident passes by the grant of the principal, but not *e converso*: for the maxim of

law is, '*Accessorium non ducit, sed sequitur, suum principale.*'

"These *incidental* rights of the reversioner, and the respective modes of descent, in which remainders very frequently differ from reversions, have occasioned the law to be careful in distinguishing the one from the other, however inaccurately the parties themselves may describe them. For if one seized of a paternal estate in fee makes a lease for life, with remainder to himself and his heirs, this is properly a mere reversion, to which rent and fealty shall be incident; and which shall only descend to the heirs of his father's blood, and not to his heirs general, as a remainder limited to him by a third person would have done: for it is the old estate, which was originally in him, and never yet was out of him. And so likewise, if a man grants a lease for life to A, reserving rent, with reversion to B and his heirs, B hath a remainder descendible to his heirs general, and not a reversion to which the rent is incident; but the grantor shall be entitled to the rent, during the continuance of A's estate.

"In order to assist such persons as have any estate in remainder, reversion, or expectancy, after the death of others, against fraudulent concealments of their death, it is enacted by the statute 6 Ann. c. 18, that all persons on whose lives any lands or tenements are holden, shall (upon application to the Court of Chancery, and order made thereupon), once in every year, if required, be produced to the Court, or its commissioners; or, upon neglect or refusal, they shall be taken to be actually dead, and the person entitled to such expectant estate may enter upon and hold the lands and tenements, till the party shall appear to be living.

"Before we conclude the doctrine of remainders and reversions, it may be proper to observe, that

whenever a greater estate and a less coincide and meet in one and the same person, without any intermediate estate, the less is immediately annihilated; or in the law phrase, it is said to be *merged*, that is, sunk or drowned in the greater. Thus, if there be tenant for years, and the reversion in fee-simple descends to or is purchased by him, the term of years is merged in the inheritance, and shall never exist any more. But they must come to one and the same person in one and the same right; else, if the freehold be in his own right, and he has a term in right of another (*en autre droit*) there is no merger. Therefore, if tenant for years dies, and makes him who hath the reversion in fee his executor, whereby the term of years also vests in him, the term shall not merge: for he hath the fee in his own right, and the term of years in the right of the testator, and subject to his debts and legacies. So also, if he who hath the reversion in fee marries the tenant for years, there is no merger: for he hath the inheritance in his own right, the lease in the right of his wife. An estate-tail is an exception to this rule: for a man may have in his own right both an estate-tail and a reversion in fee: and the estate-tail, though a less estate, shall not merge in the fee. For estates-tail are protected and preserved from merger by the operation and construction, though not by the express words, of the statute *de donis:* which operation and construction have probably arisen upon this consideration: that in the common cases of merger of estates for life or years by uniting with the inheritance, the particular tenant hath the sole interests in them, and hath full power at any time to defeat, destroy, or surrender them to him that hath the reversion: therefore, when such an estate unites with the reversion in fee, the law considers it in the light of a

virtual surrender of the inferior estate. But, in an estate-tail, the case is otherwise: The tenant for a long time had no power at all over it, so as to bar or destroy it, and now can only do it by certain special modes, by a fine, a recovery, and the like. It would therefore have been strangely improvident to have permitted the tenant in tail, by purchasing the reversion in fee, to merge his particular estate, and defeat the inheritance of his issue; and hence it has become a maxim, that a tenancy in tail, which cannot be surrendered, cannot also be merged in the fee."

And upon the subject of estate in remainder, Blackstone says (Bk. 2, Ch. XI, pp. 164-168):

"An estate then in *remainder*, may be defined to be an estate limited to take effect and be enjoyed after another estate is determined. As if a man seized in fee-simple granteth land to A for twenty years, and, after the determination of the said term, then to B and his heirs forever: here A is tenant for years, remainder to B in fee. In the first place, an estate for years is created or carved out of the fee, and given to A; and the residue or remainder of it is given to B. But both these interests are in fact only one estate: the present term of years and the remainder afterwards, when added together, being equal only to one estate in fee. They are indeed different *parts*, but they constitute only one *whole*, they are carved out of one and the same inheritance; they are both created, and may both subsist, together; the one in possession, the other in expectancy. So if land be granted to A for twenty years, and after the determination of the said term to B for life; and after the determination of B's estate for life, it be limited to C and his heirs forever: this makes A

tenant for years, with remainder to B for life, remainder over to C in fee. Now here the estate of inheritance undergoes a division into three portions: there is first A's estate for years carved out of it: and after that B's estate for life: and then the whole that remains is limited to C and his heirs. And here also the first estate, and both the remainders for life and in fee, are one estate only; being nothing but parts or portions of one entire inheritance: and if there were a hundred remainders, it would still be the same thing: upon a principle grounded in mathematical truth, that all the parts are equal, and no more than equal, to the whole. And hence also it is easy to collect, that no remainder can be limited after the grant of an estate in fee-simple: because a fee-simple is the highest and largest estate that a subject is capable of enjoying: and he that is tenant in fee hath in him the *whole* of the estate: a remainder therefore, which is only a portion, or residuary part, of the estate, cannot be reserved after the whole is disposed of. A particular estate, with all the remainders expectant thereon, is only one fee-simple: as 40 £ is part of 100 £ and 60 £ is the remainder of it: wherefore, after a fee-simple once vested, there can no more be a remainder limited thereon, than, after the whole of 100 £ is appropriated, there can be any residue subsisting.

"Thus much being premised, we shall be the better able to comprehend the rules that are laid down by law to be observed in the creation of remainders, and the reasons upon which those rules are founded.

"1. And, first there must necessarily be some particular estate precedent to the estate in remainder. As, an estate for years to A, remainder to B for life: or, an estate for life to A, remainder to B in tail. This precedent estate is called the

particular estate, as being only a small part, or *particula*, of the inheritance: the residue or remainder of which is granted over to another. The necessity of creating this preceding particular estate, in order to make a good remainder, arises from this plain reason: That *remainder* is a relative expression, and implies that some part of the thing is previously disposed of: for where the whole is conveyed at once, there cannot possibly exist a remainder: but the interest granted, whatever it be, will be an estate in possession.

"An estate created to commence at a distant period of time, without any intervening estate, is therefore properly no remainder: it is the whole of the gift, and not a residuary part. And such future estate can only be made of chattel interests, which were considered in the light of mere contracts by the ancient law, to be executed either now or hereafter, as the contracting parties should agree: but an estate of freehold must be created to commence immediately. For it is an ancient rule of the common law, that an estate of freehold cannot be created to commence *in futuro*, but it ought to take effect presently either in possession or remainder; because at common law no freehold in lands could pass without livery of seisin: which must operate either immediately, or not at all. It would therefore be contradictory, if an estate, which is not to commence till hereafter, could be granted by a conveyance which imports an immediate possession. Therefore, though a lease to A for seven years, to commence from next Michaelmas, is good; yet a conveyance to B of lands, to hold to him and his heirs forever from the end of three years next ensuing, is void. So that when it is intended to grant an estate of freehold, whereof the enjoyment shall be deferred till a future time, it is necessary to create a previous

particular estate, which may subsist till that period of time is completed: and for the grantor to deliver immediate possession of the land to the tenant of this particular estate, which is construed to be giving possession to him in remainder, since his estate and that of the particular tenant are one and the same estate in law. As, where one leases to A for three years, with remainder to B in fee, and makes livery of seisin to A: hereby the livery of the freehold is immediately created, and vested in B, during the continuance of A's term of years. The whole estate passes at once from the grantor to the grantees, and the remainder-man is seized of his remainder at the same time that the termor is possessed of his term. The enjoyment of it must indeed be deferred till hereafter; but it is to all intents and purposes an estate commencing *in praesenti*, though to be occupied and enjoyed *in futuro*.

"As no remainder can be created without such a precedent particular estate, therefore the particular estate is said to *support* the remainder. But a lease at will is not held to be such a particular estate as will support a remainder over. For an estate at will is of a nature so slender and precarious that it is not looked upon as a portion of the inheritance; and a portion must first be taken out of it, in order to constitute a remainder. Besides, if it be a freehold remainder, livery of seisin must be given at the time of its creation; and the entry of the grantor to do this determines the estate at will in the very instant in which it is made: or if the remainder be a chattel interest, though perhaps the deed of creation might operate as a *future contract*, if the tenant for years be a party to it, yet it is void by way of *remainder*: for it is a separate independent contract, distinct from the precedent estate at will: and every remainder

must be part of one and the same estate out of which the preceding particular estate is taken. And hence it is generally true, that if the particular estate is void in its creation, or by any means is defeated afterwards, the remainder supported thereby shall be defeated also: as where the particular estate is an estate for life of a person not *in esse;* or an estate for life upon condition, on breach of which condition the grantor enters and avoids the estate; in either of these cases the remainder over is void.

"2. A second rule to be observed is this: that the remainder must commence or pass out of the grantor at the time of the creation of the particular estate. As, where there is an estate to A for life, with remainder to B in fee: here B's remainder in fee passes from the grantor at the same time that seisin is delivered to A of his life estate in possession. And it is this which induces the necessity at common law of livery of seisin being made on the particular estate, whenever a *freehold* remainder is created. For, if it be even limited on an estate for years, it is necessary that the lessee for years should have livery of seisin, in order to convey the freehold from out of the grantor, otherwise the remainder is void. Not that the livery is necessary to strengthen the estate for years: but, as livery of the land is requisite to convey the freehold, and yet cannot be given to him in remainder without infringing the possession of the lessee for years, therefore the law allows such livery, made to the tenant of the particular estate, to relate and inure to him in remainder, as both are but one estate in law.

"3. A third rule respecting remainders is this: that the remainder must vest in the grantee during the continuance of the particular estate, or *eo instanti* that it determines. As, if A be tenant for

life, remainder to B in tail: here B's remainder is vested in him, at the creation of the particular estate to A for life: or if A and B be tenants for their joint lives, remainder to the survivor in fee; here, though during their joint lives, the remainder is vested in neither, yet on the death of either of them, the remainder vests instantly in the survivor: wherefore both these are good remainders. But, if an estate be limited to A for life, remainder to the eldest son of B in tail, and A dies before B hath any son: here the remainder will be void, for it did not vest in any one during the continuance, nor at the determination, of the particular estate: and even supposing that B should afterwards have a son, he shall not take by this remainder: for as it did not vest at or before the end of the particular estate, it never can vest at all, but is gone forever. And this depends upon the principle before laid down, that the precedent particular estate, and the remainder, are one estate in law: they must therefore subsist and be *in esse* at one and the same instant of time, either during the continuance of the first estate, or at the very instant when that determines, so that no other estate can possibly come between them. For there can be no intervening estate between the particular estate and the remainder supported thereby: the thing supported must fall to the ground, if once its support be severed from it."

Counsel for the Government claimed below that ours was not an estate in remainder, because an estate in remainder cannot commence *in futuro*. But in this connection it may again be observed that the statute making the grant is the law of the case, and that the sovereign power possessing the ultimate fee to these lands, could convey the lands in any way it saw fit. It

is not to Coke or Littleton or Blackstone that we go for the law of the grant, but the grant itself, and when the grantor says the grant shall take effect at a given time, it may and will do so, regardless of any technical rules of the common law. And in this connection it is important to observe that in nearly all the States of the Union, the technical rules of the common law upon this subject have been entirely changed, and freehold estates may commence *in futuro*, by deed or will, with or without the intervention of a precedent estate. (20 *Am. & Eng. Enc. of Law*, p. 836.) It, of course, will be conceded that what the States may enact as general laws, covering conveyances by persons, Congress may do in its own grants, by its own laws.

TWELFTH.

The Decision of the Court of Claims.

Many of the foregoing contentions are expressly conceded by the decision of the Court of Claims. Thus, it is therein said (R., pp. 707, 708):

> "The statute is anomalous. A land grant act containing similar terms and conditions has not been shown the Court, and doubtless none exists. The general purpose of the legislation is not difficult to ascertain. The Congress evidently was concerned in aiding and thereby procuring a connecting line of railroad extending from the main line of the Union Pacific to the Gulf of Mexico. The Civil War and the advancing settlement of the West had demonstrated its *necessity*. To facilitate its construction the eleventh section of the act sets up a competition between substantially three parallel lines and *offering as the inducement an additional extensive land grant through an undeveloped country*, every acre of which was in the

possession of and inhabited by Indians and known as Indian lands" (italics ours).

Again (R., p. 710):

> "The statute of 1866, passed as it was at the close of the war, evidently induced in part at least by the limited transportation facilities available to the Government during that crisis, sought to promote the construction of an extensive railroad line connecting the South with the East and West. In the consummation of the project and in the interest of time, the Government availed itself of the existence of three railway companies, all of which were incorporated and pursuing a course directly in harmony with the purposes of the act. The country through which the major portion of the line must pass was Indian country in the possession of the Indians and had been for many years."

In respect of the "Indian title", the decision concedes (R., p. 710):

> "The Indian title was one of occupancy, the fee was in the United States, and the right of conveyance was limited to the United States or to others by their express consent. This rule has prevailed since the first litigation involving the subject and has never been departed from in any case. (*Johnson v. McIntosh*, 8 Wheat. 543; *Jones v. Meehan*, 175 U. S. 1; *United States v. Winans*, 198 U. S. 371.) While the Indian title was limited to the use and occupation of the lands and they were held in communal ownership, still it was such a title as the United States, in theory at least, fully respected and generally protected in its dealings with the respective tribes. The question of Indian title and Indian rights has been so frequently before the courts that it is needless to multiply citations supporting this contention."

Notwithstanding these plain concessions, which admit without qualification the paramount "*necessity*" on the part of the Government for this railroad construction, the decision declares (R., p. 708):

> "There is nothing, however, in the terms of the statute, or the peculiar circumstances surrounding its enactment, which would seem to exempt the application of the usual rules heretofore applied by the Supreme Court in construing statutes of a similar character. It comes within the purview of what are commonly designated 'land grant acts'; its purpose was the same, though worded in a way to meet the exigencies of the then situation of the parties. The Supreme Court, in a long line of decisions extending over the entire range of land grant legislation in aid of railroads, has uniformly held that grants of this description are to be construed most strongly against the grantee; that nothing passes except by the explicit terms of the grant, keeping in mind that the conveyance is by act of Congress, which is always susceptible to a construction in consonance with legislative intention. (*The Dubuque and Pacific Railroad Company v. Litchfield*, 23 How. 66; *Slidell v. Grandjean*, 111 U. S. 437; *Rice v. R. R. Co.*, 1 Black, 360; *Leavenworth R. R. v. United States*, 92 U. S. 733, 739.)"

How different the language of this Court in the cognate case of *United States v. Union Pacific R. R. Co.*, 91 U. S. 72, where in discussing that grant it was most aptly said (pp. 81, 88):

> "In interpreting its legislation, no aid can be derived from subsequent events. The project of building the railroad was not conceived for private ends, and the prevalent opinion was that it

could not be worked out by private capital alone. It was a national work, originating in national necessities, and requiring national assistance."

* * * * * * * * *

"Confessedly, the undertaking was beyond the ability of unaided private capital. Only by the helping hand of Congress could the problem, difficult of solution under the most favorable circumstances, be worked out. Local business, as a source of profit, could not be expected while the road was in course of construction, on account of the character of the country it traversed; and whether, when completed, it would prove valuable as an investment, was a question for time to determine. *But vast as was the work, limited as were the private resources to build it, the growing wants as well as the existing and future military necessities of the country demanded that it be completed. Under the stimulus of these considerations Congress acted, not for the benefit of private persons, nor in their interest, but for an object deemed essential to the security as well as to the prosperity of the nation*" (italics ours).

We put the language of these two cases in apposition in order to sharply accentuate our contention that with the United States admittedly seeking and urging, in order to meet existing Government "necessity"—the construction of this road, there is neither justice nor reason in asserting, as does the Court of Claims, the rule of *strictissimi juris* in its interpretation of our grant. Had such rule been invoked and applied at that time it is perfectly plain that the road could not have then been built. It must be always remembered that it is not the question of the exclusion of *some* lands from the grant—the question presented in the many cases ruled in this Court—*but the destruction of the*

entire grant through the whole of the Indian Territory, which is involved. We are dealing here with section 9 of the act which alone makes in terms the land grant through the Indian Territory. The decision of the Court of Claims eliminates that section, and hence destroys the *entire* grant through the Territory, while in terms admitting that "To facilitate its construction, the eleventh section of the act sets up a competition between substantially three parallel lines, AND OFFERING AS THE INDUCEMENT AN ADDITIONAL EXTENSIVE LAND-GRANT THROUGH AN UNDEVELOPED COUNTRY, EVERY ACRE OF WHICH WAS IN THE POSSESSION OF AND INHABITED BY INDIANS AND KNOWN AS INDIAN LANDS."

The Court does not deny the *power* of Congress to make the grant, for it expressly rules the contrary, saying (R., pp. 708-709):

> "The courts have uniformly held in construing land-grant legislation, where the donation is a portion of the unencumbered public lands of the United States, that the grant was *in praesenti* to take effect upon the specific tracts when the line of the road is located; the grant then becomes certain and reaches back to the date of the act, having been a float until the line of the road is definitely fixed.
>
> "In construing grants *cum onere*, especially where the outstanding title or encumbrance was the Indian right of occupancy, a different rule has obtained and it would be difficult to say from a review of the authorities that the grant in each instance was *in praesenti* subject to the encumbrance. The Congress respecting legislation wherein Indian lands and reservations were known

to have been invaded by land grants has almost uniformly provided specifically as to them, either obligating itself to extinguish the title, as it did in the Pacific Railroad grants and other acts of similar character, or withholding the attachment of the grant until the Indian title has been extinguished. The Indian lands were, in the absence of express words of reservation, excepted from the operation of the grant by the general provisions found in all land-grant acts reserving lands previously disposed of by the United States by preemption or homestead entries or for any other purpose whatever. In the Leavenworth case (*supra*), the Supreme Court held that even in the absence of such reservation title would not attach to lands of this character. In the Acts of March 3, 1857 (11 Stat. 196), July 1, 1862 (12 Stat. 491), July 2, 1864 (13 Stat. 364), July 2, 1864 (13 Stat. 367), July 25, 1866 (14 Stat. 236), July 26, 1866 (14 Stat. 289), where it was apparent that the line of the railroad must pass over Indian lands, express provisions were made respecting their reservation and the extinguishment of title. In all these instances cited above the United States either withheld the grant until the Indian title was extinguished, or expressly agreed to extinguish it for the purposes of the act. In *Buttz v. Northern Pacific Railroad* (119 U. S. 55), the Supreme Court held that the grant although through Indian lands was *in praesenti* passing the fee subject to one condition only. In the *Buttz* case, however, there was an express agreement to extinguish the Indian title. In the cases where no such express obligation rested upon the Government it has been settled beyond dispute that the grant of Indian lands is in the nature of a float conditioned upon the extinguishment of Indian title, the time, manner, and conditions of extinguishing such Indian title rest

ing exclusively in the United States free from interference or contest by private parties. (*Buttz v. Northern Pacific Railroad, supra; St. Paul, Etc., Railway Co. v. Phelps,* 137 U. S. 528-541.) It may then, we think, be asserted that the general rule respecting the construction of land-grant acts rests primarily in the intent of the Congress in the pas-age of the law, and whether the title conveyed was one *in praesenti, futuro,* or a conditional promise to convey must be ascertained by taking into consideration the circumstances of the transaction, the condition of the country, and the situation of the parties at the time of the donation. The general rules as to statutory construction prevail; for while the act is treated as a conveyance it is no le-s a law of the United States and as such subject to the ascertainment of legislative intent."

But in our grant, as in every other thus cited, the words of grant are the same, namely "be and is hereby granted", or precisely equivalent phrase. Section one of our Act of July 25, 1866, making the grant in Kansas, declares "there is hereby granted to the State of Kansas", and in section 9 the language is "That the *same grants of land through the Indian Territory are hereby made* * * * ." We submit that it would violate the settled canons of consruction to now hold that the grant in section 9 was not, and was not intended to be *in praesenti* as to the *fact* of the grant, although its full enjoyment and use was necessarily postponed until the extingui-hment of the Indian title. We submit further that it is an impossible construction to say that with respect to the other grants referred to in the Court's decision there was the express agreement to extinguish the Indian title, which is lacking in ours. Impossible because there existed no reason why the

Government should so discriminate against a grant founded primarily on admitted Government "necessity", and impossible because the effort to differentiate the language of the grants violates both the settled rules of interpretation and is an offense to good morals. Indeed, we quote the frank admission of the decision below (R., p. 710):

> "It was the policy of the Government in 1866 to acquire Indian lands wherever it could in the interest of civilization, and to remove the Indians to some distant reservation carved out of the public lands. The presence of so many Indian tribes in the Western country was the result of this policy, *and the United States no doubt anticipated, and had a right to anticipate, that such a course might follow in reference to the lands granted in the Act of July* 25, 1866" (italics ours).

We submit that the concession halts in reaching the necessary and obvious conclusion that the United States in the stated grant *stipulated* to extinguish the then Indian title. To hold fifty years after the transaction that it did *not* is to read the grant solely by the light of *subsequent* events, and to ignore all then long existing practice and precedent. In short to exclude the entire *res gestae* and apply an iron rule of interpretation based on latter day transactions wherein the United Sattes stands as legislator only, and not as contractor.

In considering our grant in the light of the existing treaties the decision below indulges in plain contradiction. It urges the treaties of 1866 as dominant, and declares (R., p. 711) that

> "These treaties, antedating the granting act here in issue but a few days, assuredly negative a

governmental intention to grant to another a right just previously given under solemn treaty stipulations and at a time when the making of Indian treaties prevailed in the Government's intercourse with the Indians. The inference is irresistible; if otherwise, we must challenge the good faith of the United States in a transaction involving national honor. The United States could not grant the lands and respect the treaties unless it interposed conditions; the claimant company was not ignorant as to the situation. The United States did not agree to extinguish the Indian title; it had too recently confirmed it; nothing was left for the United States to do but what it did do. By the ninth section of the act, in language clearly prospective, it expressly annexed two conditions either one of which might defeat the grant, and in so doing followed its long-continued Indian policy and its land-grant policy of only granting absolutely public lands to aid in the construction of railroads. The United States had the absolute power to grant these lands, but certainly not the disposition so to do. That they stood in a different position in reference to them is clearly indicated by the anomalous provisions of the act and their failure to assume the responsibility of extinguishment of title."

Yet the decision in terms had declared that to facilitate the construction of the road, the Government offered "as the *inducement* an additional extensive land grant", and cited other railroad grants which would necessarily extend through country within Indian possession and held by them under treaty guarantees as solemn as those made with the tribes inhabiting the Indian Territory. The United States hence did not and could not stand in any different relation with the

tribes occupying the Indian Territory. To so declare is to at once *create arguendo* a difference in treaty relation and status between those Indians and all other tribes then occupying the public domain. The holding that the United States failed "to assume the responsibility of extinguishment of title" is untrue both in fact and in law. To so read the grant is to destroy it in the making. Moreover and confessedly, the United States *has* extinguished the "Indian title" and the *only* "Indian title" existing at the time of the grant; and the only "Indian title" within the possible meaning of the grant or the possible contemplation of the parties.

The decision of the court below is, in final analysis, founded on the assumption that the United States made two contradictory, and hence embarrassing agreements, one by treaties with the Indians assuring them the possession during their tribal existence and continued tribal occupancy; the other by grant of some of the same lands to the railroad company *cum onere*. In seeking to extinguish the tribal title in later years (and after the railroad grant had been fully earned), the Government found it advisable to allot the lands *in situ* to the individual Indians, and *hence* the railroad grant failed. In short, the decision of the Court of Claims is founded upon the assumed necessity of the Government in making such a settlement with the Indians, and in that result the railroad company becomes the victim of legislation in which it had no part and no hearing, and against which it protested in every place where its protest could be lodged. And to release the United States from its grant to and contract with the railroad company, refuge is taken under the two as-

serted conditions which accompany the grant. The precise language of the decision is (R., p. 713):

> "The United States in the act making the grant to claimant company was in no position to convey immediate title; it did not even know when, how, or in what manner it might ever convey the same, and it wisely circumscribed the grant by conditions, not only that the Indian title should be extinguished, but that the lands should again become part of the public domain, owned absolutely by the United States, free from incumbrance of any kind or character, and subject to its disposition without invading the rights of others or violating its obligations with respect thereto."

But this conclusion *assumes* that by the grant to the railroad *nothing* passed. *Contra*, and by the settled canons of interpretation, the grantee certainly took the ultimate reserved title *then* in the United States—precisely the same interest and title which by long subsequent statute the United States passed to the individual allottees. That result is clearly demonstrable.

Had the "Indian title" been extinguished and had the land so granted as reverted to the public domain, it is obvious the railroad grant would have attached thereto without need of further legislation or further assurance. So hold the cases, *supra*. Necessarily that result would obtain *solely* by force of the Act of July 25, 1866, in making the grant. If patents were issued thereunder they would not add to our title, but as often judicially held—be mere convenient *evidence* of our title. Clearly then and from the time of the grant, the railroad company securing its benefits by construction (this appellant) must have taken the *then interest of*

the grantor—the United States. It was either conveyed to the railroad company or *contracted* to be so conveyed, and as a law of Congress it would operate both as a grant and as a contract. As clearly and admittedly the title of the United States was by and under direct statute *later* passed by deed to each individual allottee in respect of the tracts so severally conveyed, can a plainer case of title or property right by contract be exhibited in a court of justice or one demanding compensation as and for property so "taken" in every justiciable sense? We submit not. When, then, it is admitted, as does the decision below (R., p. 712):

> "While in a strict and technical sense the possessory title of the Indians was by this legislation extinguished, the United States was not the beneficiary; no provision of the law vested in the Government the united title of itself and the Indians. The transition was directly the opposite; the Government divested itself of whatever title it possessed and by a united conveyance merged the lesser and the greater estate in the allottee. The Indian title was only extinguished in the sense that the Indian acquired the outstanding title of the Government and by this act merged a possessory right into a fee simple. The Indian continued in possession. It is true his estate was partitioned and his possession limited by metes and bounds, and the communal ownership of the lands destroyed, but the United States did not at any time by any provision of the law acquire the Indian title or any dominion over the lands which it did not already possess before the transaction. It was not the extinguishment contemplated by the act in order to vest title by its terms."

It must follow that the United States cannot escape

its just liability upon the ground that the extinguishment of the Indian title was not in the manner contemplated by the granting act when in the same breath it is necessarily admitted that the Government "divested itself of whatever title it possessed" by conveyance thereof to the individual allottee, when it is transparently clear that "whatever title it possessed" had been distinctly granted to us by the Act of July 25, 1866. No other conclusion can be adduced. The United States, when it made the railroad grant in 1866, held all the title it *could* have transferred to the individual allottee. The only element lacking in 1866 was the actual possession which the Indian tribes then held in community interest. When that was extinguished the *entire* title would be vested, and that Indian possession when abandoned would attach to our previous grant of the fee "without further grant." *Beecher v. Wetherby*, 95 U. S. 517. And whether such "Indian title" be extinguished or not certainly we took the entire title of the United States by force of the granting act, otherwise on extinguishment of the Indian title and resumption of the status of public lands we could take nothing. In short, we took title under our grant or not at all.

The opinion of the Court of Claims curiously argues that the United States was absolved from all obligations under the land grant unless "they could by discharging their obligations to the Indians acquire this land as it usually acquired other public lands, in which event it could comply with the statute without loss to itself or incurring liabilities enormous in extent" (R., p. 714).

With all respect to the learned court below, we submit this is a strange contention. It is matter of pub-

lic history, disclosed by numerous treaties and laws upon the statute books, that the United States has expended in the aggregate many millions of dollars in the extinguishment of Indian titles to lands falling within the limits of railroad land grants, and whereof the railroad grantee was the direct beneficiary. There can hence be no room for argument here on the proposition that the United States was absolved from obligation under this land grant to this railroad because it would cost the Government *money* to extinguish the Indian title, and thus keep faith with its grantee. If the case must be ruled finally against us, decent regard for public good faith would seem to require that the adverse decision be planted on some other ground, for we submit it is clear that the *consideration* for the full grant of these lands was sought and obtained from us by the construction of the railroad the Government so earnestly sought and desired. Certainly after forty years of actual enjoyment and use thereof the Government should not escape its just liability upon such a plea.

And in this connection it is pertinent to add that the Court of Claims lays controlling stress upon the proviso to our grant which reads, "*Provided*, that said lands become a part of the public lands of the United States." Holding to the technical definition of the term "public land" as being such "as is subject to sale or other disposition under general laws", and citing as the earliest case *Newhall v. Sanger* (92 U. S. 761, 763—decided ten years after the railroad grant of 1866), the decision concludes that by reason of the treaties "they were no longer part of the public domain, subject to disposal under general laws", while admitting in that connection that "it did not require a

public survey to make them public lands, and upon the extinguishment of the Indian title if within the intent of the act they would have passed under the grant, for the railroad had long since definitely located its line of road" (R., p. 713).

The reason primarily assigned by the decision of the Court of Claims as supporting the conclusion is thus expressed therein (R., pp. 713-714):

> "It is not to be presumed that the United States would, by treaty stipulations, provide lands for tribal Indians, an unlettered and dependent people, and at the same time enact legislation which by its express terms would incapacitate it from disposing of said lands in the very manner they had expressly agreed to do. The successive acts by which the Indians received their allotments in severalty were, in effect, agreements between the Indians and the United States. The Indians did not cede title to the United States, and, if they did, it was in pursuance of an agreement not to throw said lands open to public settlement, nor to allow the United States the absolute power of disposal, but to reconvey them to the Indians in severalty, making them in no event public lands in the sense in which that term is used in referring to that particular portion of the landed possessions of the United States. If they became public lands and claimant company's grant attached, then the United States, in violation of express contracts, gave to the claimant company over 3,000,000 acres of land belonging to the respective tribes concerned herein, which some of them had occupied and owned, as Indian tribes owned land, since 1828. That it did not so intend is evidenced by the twenty seventh section of the Act of April 26, 1906 (34 Stat. 148), wherein it is expressly stated that said lands shall not become public lands nor the prop-

erty of the United States. It is more consistent with the circumstances of the grant to say that the proviso was inserted for the purpose of enabling the United States to discharge its obligations under the treaties of 1866 by distinguishing between lands which are simply the property of the United States and its public lands donated to settlers and others for the purposes of internal improvements. As before observed, if rights claimed under the Government be set up against it, they must be so clearly defined there can be no question of the purpose of Congress to confer them'" (*Leavenworth case, supra*).

But in all of this contention there is the plain fact developed that the United States, having the conceded *power* to extinguish the Indian title in the manner contemplated by the act making the railroad grant, deliberately, years after the grant, chose a method of procedure and consequent legislation which defeated the railroad grant; defeated the *only* possible understanding on which the railroad grant was made and accepted, and after full performance by the railroad grantee of all things it was required to do. And yet the decision holds that such conduct by the grantor was justified because to do what by the granting act *it was agreed should be done*, would perforce require the Government to acquire the Indian title, although it could not do so "without loss to itself or incurring liabilities enormous in extent", to use the Court's own language. But in making the grant to the railroad company in 1866, *that* reason was neither expressed nor we submit fairly implied. Extinguishment of the Indian title in respect of other railroad grants made *cum onere* of the Indian title had cost the United States vast sums in money where purchased or in large land

values where exchanged. In no other case of record within our knowledge was the just obligation thus assumed by the Government sought to be evaded on any such ground. The assumption of the Court's decision in this regard, we respectfully submit, discloses at once the fallacy of the reasoning employed. The Court concedes (1) that the railroad grant *was* made; (2) that it was fully earned by prompt construction of the railroad; (3) that Congress had the power to grant its title in the lands burdened only with the Indian title of occupancy; (4) that such Indian title was subject to extinguishment when and as the United States should determine. But it says in effect that as years after the grant was made and so fully earned the United States changed its policy and proceeded by legislation to convey to individual Indian allottees all the reserved title which the Government owned (and which it granted to the railroad company in 1866, if the Act of Congress is anything more than simply sound), that *hence* the railroad grant fails in toto. And the *justification* for that remarkable conclusion is that if the United States had sought to keep faith with its railroad grantee it would have cost the United States a large sum of money. That reasoning and conclusion in a court of justice should fall from its own inherent fallacy and weakness.

But it is admitted by the averments of the petition and demurrer thereto that there was a considerable surplus of these lands falling within the primary limits of the railroad grant which were not allotted to individual Indians, such as lands withheld for leasing in the manner prescribed by the later statutes. As to such lands the petition claimed that they were subject to the railroad grant and disposal contrary thereto

and as by the statute prescribed should justly entitle the claimant and appellant to just compensation for such taking. That contention is denied by the Court of Claims, its decision holding (R., p. 715):

> "What has been said before applies to them; the United States never acquired title to them free from incumbrance; they were never conveyed or in any way ceded to the United States. The very terms of the agreement fix their status, and though disposed of to other than Indians no part of the consideration ever reached the treasury as funds belonging to the United States. The United States in fact transferred its title to the Indian and permitted the Indian to transfer it to another. Lands allotted to intermarried whites and former negro slaves were in the same category. The status of these people having been fixed by Indian laws it was carried into the agreement as to allotment; they did not take by preemption or homestead entries or by any manner similar to the ones used in disposing of public lands."

This concession that "*The United States in fact transferred its title to the Indian and permitted the Indian to transfer it to another*" is the foundation of our claim. If the grant of 1866 to us did *anything*, it clearly conveyed to us, or in the strictest view against us, agreed to convey to us, the Government's *then* reserved title. Decisions of this Court cited, *supra*, declare that title to be the fee simple burdened with the Indian occupancy right. And yet the Court of Claims while admitting the later transfer of the Government's title to the Indian and permitting "the Indian to transfer it to another" holds the railroad grantee of that title as made by the Act of 1866 has no

right to recover the value of its property thus plainly so taken.

The decision of the Court of Claims concludes with the declaration that the Congress did not do a "vain thing." We submit in view of the judgment entered against us that Congress *did* do a "vain thing", for it has committed, in our view, a flagrant breach of contract, and made its solemn act wholly and utterly meaningless. In the last word, the decision seeks to justify its conclusion by the suggestion that—

> "There was no possible way for the claimant company or either of its competitors to connect their railroad lines and reach the coast via Preston (now Denison), Texas, except by permission of the Congress to pass through Indian Territory. The keenness of the competition and the subsequent disputes relative thereto appearing in claimant's exhibits to its petition indicate the zeal of the competitors" (R., p. 716).

We put again in apposition to this language the words of the Court, found on a preceding page of its opinion—

> "The Congress evidently was concerned in aiding and thereby procuring a connecting line of railroad extending from the main line of the Union Pacific to the Gulf of Mexico. The Civil War and the advancing settlement of the West had demonstrated its *necessity*. To facilitate its construction the eleventh section of the act sets up a competition between substantially three parallel lines, *and offering as the inducement an extensive land grant through an undeveloped country*, every acre of which was in the possession of and inhabited by Indians and known as Indian lands" (R., pp. 707-708).

And yet the Court *concludes* its decision, and as justifying its judgment with the remarkable suggestion that to build through such a country *all* that the competitors sought and all they then understood would be received was the right "to pass through Indian Territory." No comment is required. To reconcile this diverse reasoning is impossible. But it does emphasize most thoroughly the fundamental error of the learned Court, which finding a grant in terms, conceding the power of Congress to so grant, and to thereby *convey* the Government title *cum onere* the Indian possession, yet concludes that the grant contains language which enabled Congress lawfully to ignore it; to save to the treasury an assumed large expenditure in order to avoid its pledge and promise, and later legislate *ex parte* to convey to the individual Indian that title which it had long before passed to us with the assurance of complete enjoyment in possession "whenever the Indian title shall be extinguished by treaty or otherwise." The United States promptly obtained the road for which there was conceded urgent public "necessity"—but its grantee must hold only the Government's broken promise.

All lands whereto the Indian title has been extinguished have not, in recent years, thereby been made subject to disposal under all the general public land laws, which, according to the decision below, is the test of the proviso here in question.

In many instances the treaties or agreements have provided that on the surrender or cession of the Indian title, the lands should be sold to actual settlers only in limited areas and for a money price. In such cases the extinguishment of the Indian title, united to the ultimate title or fee of the Government, was followed by

the Government's sale and conveyance by patent of the fee, the right of possession, and the possession to such settlers. Now, could it be claimed in the present case that the United States could have extinguished the Indian title to the lands here in question, under treaty or agreement which provided for their sale to actual settlers, and *in that manner* defeat the railroad grant? The illegality and immorality of such a transaction would be most glaring, when made in the face of a contract executed on the part of the railroad grantee. How then can it be said with any more legal force or morality that the Government could transfer to the individual Indian, by act of Congress or formal conveyance, *its* ultimate title, and for the manifest purpose of defeating its prior and outstanding railroad grant? It is true that the agreements and acts of Congress ratifying them do not call for any formal conveyance from the Government to the individual Indian allottee, but the acts of Congress do declare that the deeds made by the principal chiefs of the nations to such individual allottees shall, in legal effect, operate to convey all the interest of the United States in the lands so deeded. Here, and in the plainest manner, the United States has undertaken to part with its ultimate title for the benefit of the individual Indian allottee, thereby stripping the Government of all power to make good its long prior grant to the railroad grantee. To restate, in a sense, the suggestion, *supra*, the legal effect of this action is that by the Government's voluntary act, and in pursuance of its own policy, it has ignored the legal and binding effect of its prior contract with the railroad grantee and, as matter of deliberate choice, undertaken to confer its title upon the individual Indian allottee. To argue that the

Government thereby escapes all obligation to the railroad grantee is to assert that the proviso was inserted in the original contract between the Government and the railroad grantee in order to enable the Government by its later and voluntary action to wholly repudiate and escape its plain obligation. It matters not in what form the argument is put from the Government's standpoint. *That* is the concrete result. It certainly does not accord with the language of the Supreme Court in the *Sinking Fund cases* (99 U. S. 720), cited, *supra*. As between individuals, full and certain remedy would be found to compensate such a wrong. Where the United States has deliberately gone to work and prevented the fulfillment of its own obligation, and pleads its own voluntary action as the reason for evading that obligation, then such an argument, if successful in a court of justice, puts an end to government by law.

Again as to those lands in the Indian Territory which have been disposed of by the Government as townsites there can be no doubt but what the Indian title has been extinguished, in any view of the case, and that said lands became and were disposed of by the Government as public lands of the United States.

The claimant's petition specifically alleges that in and by the terms of the several acts of Congress referred to townsite commissions were appointed by the Secretary of the Interior of the United States to lay out, plat, and dispose of certain of the lands for townsite purposes, and that the United States, upon the laying out and platting of the townsites, proceeded to sell the lots and blocks thereof and to execute or cause to be executed to the various purchasers thereof deeds or patents. There is attached to the petition copies of

the form of townsite deeds which the United States executed or caused to be executed to the various purchasers of town lots in the Cherokee, Creek, Choctaw, and Chickasaw nations. It is alleged that the townsites were laid out under the direction of the Secretary of the Interior of the United States and of the Supervising Engineer of the United States, and that after the plats of the townsites were prepared they were approved by the Secretary of the Interior, and that thereafter the town lots and blocks constituting such townsites were appraised by commissioners appointed by the Secretary of the Interior of the United States and disposed of at prices fixed by the Secretary of the Interior, as in the various acts of Congress provided (Petition, p. 65).

And it is further alleged in the petition, page 66, "that all of the expenses attendant upon the survey, platting, and sale of such town lots and blocks have been paid by the United States, and that such town lots and blocks have been sold to divers and sundry persons, irrespective of their citizenship or residence and irrespective of whether or not they were Indians by blood or former members of the Cherokee, Creek, Choctaw, or Chickasaw nations."

And in the petition (page 70) it is further alleged that under the acts of Congress set forth concerning the disposition of said townsite lands that the same were sold at the land offices of the United States established in the Cherokee, Creek, Choctaw, and Chickasaw nations by practically the same methods generally pursued by the United States in the disposition of its other public lands.

And it is further alleged (page 71) "that the townsites so as aforesaid located and laid out upon certain

of the odd-numbered sections so as aforesaid granted to your petitioner were laid out, surveyed, platted, and sold by the United States and its agents in substantially the same manner that townsites are laid out and authorized to be laid out upon other public lands of the United States, in accordance with the general laws of the United States."

By the Government's demurrer these facts are admitted. There can be no doubt of their truth, because they are all based on acts of Congress specifically referred to in the petition.

In the Government's brief below counsel say:

> "Has the 'Indian title' been 'extinguished?' The answer to this question mainly depends upon whether Congress intended the term 'Indian title' to refer to the tribal title. If it did, then it may be conceded for the purpose of the demurrer in this case that the 'Indian title' has been extinguished. If, on the other hand, Congress intended the term 'Indian title' to mean such title as the individual members of the tribe might acquire, then the Indian title has not been extinguished."

Under any view of the case, therefore, as to these townsite lands, the Indian title has been extinguished, and that fact is admitted by counsel for the Government. Of course, there is no justification whatever for the suggestion that Congress intended the term "Indian title" to mean such title as the individual members of the tribe might thereafter acquire, and no authorities are cited in support of this suggestion. That the words "Indian title" did mean tribal title there can be no on doubt, and it was so held by the Supreme Court of the United States in the case of *Fleming v. McCurtain*, 215 U. S. 56, *supra*.

The assumption of the Court below that because the proceeds of the sale of these townsites did not reach the treasury as funds of the United States no liability can arise, does not we submit alter the legal result. The United States has sought to merge *its* title (previously granted us) with the Indian title—to adopt the Court's own theory—and in so doing has clearly "appropriated" our prior interest in the property. That it cannot do without making to us just compensation.

For convenience we have printed in the Appendix, pages 349 and 371, the opinion of the Court of Claims by Judge Booth, and the concurring opinion of Judge Howry.

CONCLUSION.

To summarize, the case may be stated thus:

The United States offered and promised the appellant that if it would build its line of railroad to the northern boundary of the Indian Territory before any other road constructed to that point, it should have certain lands. The grant was *in praesenti*, to come into enjoyment when the Indian tribal title was extinguished.

The appellant built its line to the required point ahead of any of its competitors. The United States by its authorized executive so found and declared. Thereupon the appellant promptly built its road across the Indian Territory as the recognized beneficiary of the grant and granting Act of July 25, 1866, and the United States has long enjoyed the use thereof. In the language of the court below, "The Civil War and the advancing settlement of the West had demonstrated its necessity" (R., 707).

Thus an ordinary unilateral contract was consummated, by which the claimant having rendered the service called for by the offer, became absolutely entitled to be made the owner of the lands offered in payment.

Though the full beneficial ownership of the lands granted and promised was to be postponed till the extinguishment of the Indian title and till the lands became public lands, these provisos, even if they are conditions, do not affect the appellant's present rights. Both contingencies have happened; and if they have not happened the failure can only have been due to the intentional acts of the grantor, from which it cannot be permitted to benefit, and which are themselves breaches of the explicit obligation which necessarily formed a part of the contract, to cause the occurrence of the contingencies and the fulfillment of the conditions.

The Court of Claims has jurisdiction because the case is one for the breach of an express contract based on a statute of the United States, and because even if it be treated as a mere suit to recover the value of lands owned by the claimant and appellant, it is an action upon an implied contract to pay for lands so taken and one based on the Constitution of the United States.

The defendant has failed to perform the continuing obligation of the grant, and its obligation to perform such executory acts as, by the grant contract, it agreed to perform. Instead of investing the claimant with the full beneficial ownership of the lands and defending that ownership, it has so used its irresistible power as to deprive the claimant thereof and vest the same in others. It has broken and violated every contractual obligation, both executed and executory,

assumed by it in its grant, and for that breach is liable to the claimant and appellant in damages.

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Of Counsel.

APPENDIX.

APPENDIX.

COURT OF CLAIMS OF THE UNITED STATES.

Missouri, Kansas & Texas Ry. Co.
vs.
United States.
No. 30016.

Decided December 4, 1911.

Booth, J., delivered the opinion of the Court.

This is a demurrer to claimant's petition. The Missouri, Kansas & Texas Railway Co., claimant herein, is a Kansas corporation and was originally incorporated under the name of Union Pacific Railroad, Southern Branch. In 1870, by the consent and approval of the Kansas Legislature, it assumed its present name and has retained it since. Claimant company is a *land-grant* road, and as such is here claiming the benefits of a land grant act passed July 25, 1866. On March 3, 1863 (12 Stats., 772), Congress granted certain specified sections of the public lands in Kansas to that State to aid in the construction of a railroad from Atchison on its eastern border, via Topeka, the capital of the State, thence across the entire State to its western boundary. The same act provided for a branch line extending from what is now Emporia, Kans., down the Neosho River Valley to intersect with the line of the Leavenworth, Lawrence & Fort Gibson Railroad. The grant of public lands contained in the act was accepted by the Atchison, Topeka & Santa Fe Railway Co. upon certain conditions, one of which was a concession with a similar grant to construct a branch line northward from Emporia to intersect the Union Pacific Railroad, Eastern Branch, at Fort Riley (now Junction City, Kans.). On July 1, 1864 (13 Stats., 339), Congress extended the grant of 1863 to the northern branch, and the Atchison, Topeka & Santa Fe Co. accepted the same. The Atchison, Topeka & Santa Fe Co. constructed the main line across the State from east to west, but did not con-

struct the branch lines. On March 19, 1866, the Atchison, Topeka & Santa Fe assigned to claimant company all its right, title and interest in the grant respecting the branch lines, and the claimant company, with the consent of the Kansas Legislature, accepted the grant and assumed its obligations. The claimant company's original articles of incorporation intended the construction of a railroad from Fort Riley on the line of the Union Pacific, of which system it was then a part, southward through the Neosho River Valley to the southern boundary of Kansas, with power to extend its line across Indian Territory. In 1866 and before the grant had been earned under the acts of 1863 and 1864 the Congress, on July 25, 1866, passed two acts, one on July 25, 1866, and the other the following day, July 26, 1866. Rights under the last statute are not involved here, the act of July 25, 1866 (14 Stats., 236), being the one upon which the claimant company predicate their case. The granting clauses of these two subsequent statutes did, however, materially modify the terms and conditions of the former acts of 1863 and 1864 respecting the Neosho Valley lines. The first section of the act of 1866 granted to the State of Kansas, for the use and benefit of the Kansas & Neosho Valley Railroad Co., a Kansas corporation, every alternate section of land, or parts thereof, designated by odd numbers, to the extent of ten sections per mile on each side of said road, to be selected within twenty miles of the line of said road, with power and authority given to select indemnity lands in cases where the United States had previously disposed of any of said sections by sale, pre-emption or homestead entries. The usual clauses as to previous reservations, railroad rights of way, etc., were

included in the act. The purpose of the grant was to aid in the construction of a railroad from the eastern terminus of the Union Pacific, on the line between Missouri and Kansas, thence southward across the eastern tier of counties in said State, with an ultimate view of connecting at Red River, at or near Preston (now Denison), Tex., with a railroad then in course of construction from Galveston, Tex., to that point. In furtherance of this comprehensive scheme of railroad building, section 9 of the act of July 25, 1866, provided "that the same grants of lands through said Indian Territory are hereby made as provided in the first section of this act, whenever the Indian title shall be extinguished by treaty or otherwise, not to exceed the ratio per mile granted in the first section of this act: *Provided*, That the lands become a part of the public lands of the United States."

Section 11 of the act of 1866 provided, among other things, as follows: "That should the Leavenworth, Lawrence and Fort Gibson Railroad Company, or the Union Pacific Railroad Company, Southern Branch, construct and complete its road to that point on the southern boundary of the State of Kansas where the line of the said Kansas and Neosho Valley Railroad shall cross the same, before the said Kansas and Neosho Valley Railroad Company shall have constructed and completed its said road to said point, then in that event the company so first reaching in completion the said point on the southern boundary of the State of Kansas shall be authorized, upon obtaining the written approval of the President of the United States, to construct and operate its line of railroad from said point to a point at or near Preston, in the State of

Texas, with grants of lands according to the provisions of this act * * *."

The claimant company, acting under said act, entered upon the construction of its road, and was the first of the competing lines to reach the point designated in the act. On July 22, 1870, it was formally notified of its rights under the statute and duly authorized upon compliance with certain formalities to proceed with the construction of its road through Indian Territory.

The petition alleges, and it is not here open to dispute, that it did proceed with reasonable dispatch to complete its line through Indian Territory, and that the same was accepted and approved by the proper officers of the Government as a compliance with the statute in 1873. The petition further alleges that, in pursuance of a general governmental policy, the United States, through Congress, the executive departments, the Secretary of the Interior, the Commission to the Five Civilized Tribes and the various townsite commissions, has extinguished the Indian title to said lands by treaties and legislation relative thereto; that the greater portion of said lands have been allotted to the individual Indians belonging to said tribes, patents issued therefor, and the unallotted lands sold by the defendants to purchasers other than Indians and otherwise disposed of, irrespective of claimant's right and title thereto, and despite its repeated protests to each and all the proceedings. The petition concludes with the averment that the United States has extinguished the Indian title to all said lands embraced within its grant; that said lands did become a part of the public lands of the United States; that the United States not only failed to carry into exe-

cution its obligations under the act of July 25, 1866, but by allotting to said Indians and otherwise selling and disposing of said lands, made the performance of the contract impossible upon its part, thereby depriving the petitioner of 3,114,368 acres of land of the value of $61,287,800, for which amount it asks judgment.

The issue raised by defendants' general demurrer involves the construction of the act of July 25, 1866, defendants contending that under the allegations of the petition the lands claimed for never became public lands within the intention of the parties; that the Indian title to said lands if extinguished was done in pursuance of previous valid subsisting treaties so to do; that the grant to claimant company was not *in praesenti*, but more in the nature of a promise of a grant to be made *in futuro* upon the happening of certain contingencies.

The statute is anomalous. A land grant act containing similar terms and conditions has not been shown the Court, and doubtless none exists. The general purpose of the legislation is not difficult to ascertain. The Congress evidently was concerned in aiding and thereby procuring a connecting line of railroad extending from the main line of the Union Pacific to the Gulf of Mexico. The Civil War and the advancing settlement of the West had demonstrated its necessity. To facilitate its construction the eleventh section of the act sets up a competition between substantially three parallel lines and offering as the inducement an additional extensive land grant through an undeveloped country, every acre of which was in the possession of and inhabited by Indians and known as Indian lands.

There is nothing, however, in the terms of the stat-

ute, or the peculiar circumstances surrounding its enactment, which would seem to exempt the application of the usual rules heretofore applied by the Supreme Court in construing statutes of a similar character. It comes within the purview of what are commonly designated "land grant acts"; its purpose was the same, though worded in a way to meet the exigencies of the then situation of the parties. The Supreme Court, in a long line of decisions extending over the entire range of land grant legislation in aid of railroads, has uniformly held that grants of this description are to be construed most strongly against the grantee; that nothing passes except by the explicit terms of the grant, keeping in mind that the conveyance is by act of Congress, which is always susceptible to a construction in consonance with legislative intention. (*The Dubuque and Pacific Railroad Company* v. *Litchfield*, 23 How. 66; *Slidell* v. *Grandjean*, 111 U. S. 437; *Rice* v. *R. R. Co.*, 1 Black. 360; *Leavenworth R. R.* v. *United States*, 92 U. S. 733, 739.)

In the last cited case, wherein a grant through Indian lands was directly involved, Mr. Justice Davis used this language in reference to its construction:

> "This grant, like that to Iowa, was made for the purpose of aiding a work of internal improvement, and does not extend beyond the intent it expresses. It should be neither enlarged by ingenious reasoning nor diminished by strained construction. The interpretation must be reasonable, and such as will give effect to the intention of Congress. This is to be ascertained from the terms employed, the situation of the parties and the nature of the grant. If these terms are plain and unambiguous there can be no difficulty in interpreting them; but if they admit of different

> meanings—one of extension and the other of limitation—they must be accepted in a sense favorable to the grantor: and if rights claimed under the Government be set up against it they must be so clearly defined that there can be no question of the purpose of Congress to confer them. In other words, what is not given expressly or by necessary implication is withheld."

Subsequently, in *Winona & St. Peter R. R. Co.* v. *Barney* (113 U. S., 625), Mr. Justice Field, in construing certain acts granting public lands to the State of Minnesota to aid in the construction of railroads, condensed in a few words the rule directly applicable to the present case:

> "The solution of these questions depends, of course, upon the construction given to the acts making the grants, and they are to receive such a construction as will carry out the intent of Congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyance. To ascertain that intent we must look to the condition of the country when the acts were passed as well as to the purpose declared on their face and read all parts of them together."

The courts have uniformly held in construing land-grant legislation, where the donation is a portion of the unincumbered public lands of the United States, that the grant was *in praesenti* to take effect upon the specific tracts when the line of the road is located; the grant then becomes certain and reaches back to the date of the act, having been a float until the line of the road is definitely fixed.

In construing grants *cum onere*, especially where

the outstanding title or incumbrance was the Indian right of occupancy, a different rule has obtained and it would be difficult to say from a review of the authorities that the grant in each instance was *in praesenti* subject to the incumbrance. The Congress respecting legislation wherein Indian l ds and reservations were known to have been invaded by land grants has almost uniformly provided specifically as to them, either obligating itself to extinguish the title, as it did in the Pacific railroad grants and other acts of similar character, or withholding the attachment of the grant until the Indian title has been extinguished. The Indian lands were, in the absence of express words of reservation, excepted from the operation of the grant by the general provisions found in all land-grant acts reserving lands previously disposed of by the United States by pre emption or homestead entries or for any other purpose whatever. In the Leavenworth case (*supra*) the Supreme Court held that even in the absence of such reservation title would not attach to lands of this character. In the acts of March 3, 1857 (11 Stat., 196), July 1, 1862 (12 Stat., 491), July 2, 1864 (13 Stat., 364), July 2, 1864 (13 Stat., 367), July 25, 1866 (14 Stat., 236), July 26, 1866 (14 Stat., 289), where it was apparent that the line of the railroad must pass over Indian lands, express provisions were made respecting their reservation and the extinguishment of title. In all these instances cited above the United States either withheld the grant until the Indian title was extinguished, or expressly agreed to extinguish it for the purposes of the act. In *Buttz v. Northern Pacific Railroad* (119 U. S., 55) the Supreme Court held that the grant, although through Indian lands, was *in praesenti* passing the fee subject to one

condition only. In the *Buttz* case, however, there was an express agreement to extinguish the Indian title. In the cases where no such express obligation rested upon the Government it has been settled beyond dispute that the grant of Indian lands is in the nature of a float conditioned upon the extinguishment of Indian title, the time, manner and conditions of extinguishing such Indian title resting exclusively in the United States free from interference or contest by private parties. (*Buttz* v. *Northern Pacific Railroad*, *supra*; *St. Paul, Etc., Railway Co.* v. *Phelps*, 137 U. S. 528-541). It may then, we think, be asserted that the general rule respecting the construction of land grant acts rests primarily in the intent of the Congress in the passage of the law, and whether the title conveyed was one *in praesenti*, *futuro*, or a conditional promise to convey must be ascertained by taking into consideration the circumstances of the transaction, the condition of the country and the situation of the parties at the time of the donation. The general rules as to statutory construction prevail, for while the act is treated as a conveyance it is no less a law of the United States and as such subject to the ascertainment of legislative intent.

The Indian title was one of occupancy, the fee was in the United States, and the right of conveyance was limited to the United States or to others by their express consent. This rule has prevailed since the first litigation involving the subject and has never been departed from in any case. (*Johnson* v. *McIntosh*, 8 Wheat. 543; *Jones* v. *Meehan*, 175 U. S. 1; *United States* v. *Winans*, 198 U. S. 371.) While the Indian title was limited to the use and occupation of the lands and they were held in communal ownership, still it was

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such a title as the United States, in theory at least, fully respected and generally protected in its dealings with the respective tribes. The question of Indian title and Indian rights has been so frequently before the courts that it is needless to multiply citations supporting this contention.

The statute of 1866, passed as it was at the close of the war, evidently induced in part at least by the limited transportation facilities available to the Government during that crisis, sought to promote the construction of an extensive railroad line connecting the South with the East and West. In the consummation of the project and in the interest of time, the Government availed itself of the existence of three railway companies, all of which were incorporated and pursuing a course directly in harmony with the purposes of the act. The country through which the major portion of the line must pass was Indian country in the possession of the Indians and had been for many years. The Creek Indians acquired their lands in Indian Territory in 1834, the Choctaws in 1830, and the Cherokees in 1828. They had been removed in accord with treaty stipulations, by the terms of which each tribe had ceded to the Government vast areas of land in the more populous East in exchange for these lands in the West. No doubt at the time of their removal the Government thought they had selected for the Indians a new habitat ideal in nature and extent: the country was a vast wilderness, absolutely undeveloped and then considered beyond the range of immediate settlement by the whites. The United States at this time and at the time of the passage of the act of July 25, 1866, treated Indian tribes as a dependent sovereignty under the supervision, guardianship and control of the

United States, but still accorded them sufficient autonomy to regulate their own tribal affairs and enforce their own peculiar tribal laws and customs. Innumerable treaties were made with the representatives of the tribes; the negotiations therefor were as solemnly carried on as with a foreign nation. The title to and dominion over their tribal lands was accorded the same respect as though possessed in fee simple, and the United States always, without a single exception brought to our attention, either purchased the Indian land for a money consideration or ceded public lands in exchange for those acquired. It was the policy of the Government in 1866 to acquire Indian lands wherever it could in the interest of civilization, and to remove the Indian to some distant reservation carved out of other public lands. The presence of so many Indian tribes in the western country was the result of this policy, and the United States no doubt anticipated, and had a right to anticipate, that such a course might follow in reference to the lands granted in the act of July 25, 1866. Whenever Indian tribal lands were acquired by treaty or otherwise they were made part of the public domain and thrown open to settlement by preemption and homestead entries.

What was the situation of the parties at the time? All but one of the tribes occupying the lands in issue had joined the Confederacy during the war; it therefore became necessary to readjust their tribal status. The Government by three separate treaties, signed April 28, 1866 (14 Stat., 769), June 14, 1866 (14 Stat., 785), and July 19, 1866 (14 Stat., 799), covenanted, among other things, to secure said Indians in their title to their lands, and that whenever it was for their best interests the same would be allotted in severalty

among them. These treaties, antedating the granting act here in issue but a few days, assuredly negative a governmental intention to grant to another a right just previously given under solemn treaty stipulations and at a time when the making of Indian treaties prevailed in the Government's intercourse with the Indians. The inference is irresistible; if otherwise, we must challenge the good faith of the United States in a transaction involving national honor. The United States could not grant the lands and respect the treaties unless it interposed conditions; the claimant company was not ignorant as to the situation. The United States did not agree to extinguish the Indian title; it had too recently confirmed it; nothing was left for the United States to do but what it did do. By the ninth section of the act, in language clearly prospective, it expressly annexed two conditions, either one of which might defeat the grant, and in so doing followed its long-continued Indian policy and its land grant policy of only granting absolutely public lands to aid in the construction of railroads. The United States had the absolute power to grant these lands, but certainly not the disposition so to do. That they stood in a different position in reference to them is clearly indicated by the anomalous provisions of the act and their failure to assume the responsibility of extinguishment of title.

Subsequent to the passage of the act a different policy was inaugurated by the United States with respect to Indian tribes and tribal lands. Being substantially contemporaneous with the act, it may have then been anticipated. In 1871 the United States discontinued its recognition of Indian tribes as dependent sovereignties and the Congress assumed control.

Treaties were no longer negotiated, and a comprehensive scheme was adopted involving the ultimate dissolution of the tribes, the allotment of their lands, and the citizenizing of the individual Indian. The western country was rapidly becoming more populous, settlements of considerable size were being erected, public lands were enhancing in value, and the demand therefor rapidly increasing. Territories were seeking admission into the Union, and Indian reservations, usually considered a menace to great advancement, were condemned by the public sentiment of the times. The Indian tribes themselves were becoming more and more adverse to continued removals and the Government finding it more than difficult to find new locations out of the public domain upon which to relocate them.

In 1884 (23 Stat., 96) an Indian residing on the public lands of the United States was permitted to avail himself of the homestead laws.

In 1887 (24 Stat. L., 388) a most comprehensive law was passed providing for the allotment of Indian lands in severalty to Indian tribes residing on Indian reservations, and conferring on them the rights of citizenship. This statute did not reach the Indian tribes concerned in this suit; the reason therefor will appear hereafter. In 1889 (25 Stat. L., 783) a United States court was established in Indian Territory and its jurisdiction defined. In March, 1889, the entire western half of Indian Territory was ceded to the United States by the Indians then in possession thereof, out of which lands the Territory of Oklahoma was established in 1890. In fact, legislation too extensive to review was enacted at each session of the Congress tending toward the plainly expressed purpose to ultimately discontinue the previous relationship of the United States

toward its Indian tribes. (*Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 25 Stat. L., 642.)

In March, 1893 (27 Stat. L., 645), by the sixteenth section of the general appropriation act for the Indians, the Congress provided for a commission to negotiate with the Creeks, Chickasaws, Choctaws and Cherokee Indian tribes—tribes exempt from the act of 1889, *supra*, and the tribes whose lands are concerned in this suit—looking toward a dissolution of their tribes and a cession or allotment in severalty among them of their lands. While the expressed purpose of the law was to ultimately create a State of the Union out of the territory inhabited by the Indian tribes, it likewise was in entire accord with the general Indian policy of the Government. The commission appointed under this act, commonly known as the Dawes Commission, proceeded to the negotiations with the Indians and finally, after several years, secured agreements from the respective tribes as to the terms and conditions upon which they would willingly submit to a disposition of their landed interests. The Creek agreement was ratified by the Congress in 1901 (31 Stat. L., 861), the Choctaw and Chickasaw agreement in 1902 (32 Stat L., 641), and the Cherokee agreement in 1902 (32 Stat. L., 716). Under these agreements the lands of the tribes mentioned were allotted to them in severalty, with certain exceptions as to townsites, school and church lands, etc. Some wholesome and precautionary reservations were made of mineral lands, but the entire body of Indian lands, with these exceptions, became the individual property of the individual Indian in severalty being conveyed to the allottee by the joint act of the Indian and the Government.

While in a strict and technical sense the possessory

title of the Indians was by this legislation extinguished, the United States was not the beneficiary; no provision of the law vested in the Government the united title of itself and the Indians. The transition was directly the opposite; the Government divested itself of whatever title it possessed and by a united conveyance merged the lesser and the greater estate in the allottee. The Indian title was only extinguished in the sense that the Indian acquired the outstanding title of the Government and by this act merged a possessory right into a fee-simple. The Indian continued in possession. It is true his estate was partitioned and his possession limited by metes and bounds and the communal ownership of the lands destroyed, but the United States did not at any time by any provision of the law acquire the Indian title or any dominion over the lands which it did not already possess before the transaction. It was not the extinguishment contemplated by the act in order to vest title by its terms.

What was intended by the proviso to section 9 of the granting act: "*Provided*, That said lands become a part of the United States"? The usual office of a proviso to a statute is too well known to require repetition. If the term "public lands", as used in the statute, is to receive the meaning accorded it in treaties and public laws, it means "such land as is subject to sale or other disposal under general laws". (*Newhall v. Sanger*, 92 U. S. 761 763; *United States v. Thomas*, 151 U. S. 577 583; *Northern Lumber Co. v. O'Brien*, 139 Fed. R. 616.) It has been suggested that the extinguishment of the Indian title and the lands becoming public lands are synonymous terms and that the lands having been public lands previous to Indian occupancy, nothing afterwards supervened to change

their character, except the incumbrance of the Indian title. The contention is in a measure correct, but the subvention of Indian title by means of treaty stipulation, a contract equally as sacred as the act of July 25, 1866, and for which a consideration proportionately as great passed, changed the character of the lands: they were no longer part of the public domain, subject to disposal under general laws, and in the absence of express and explicit language did not pass under land grant laws, even though not expressly reserved. It did not require a public survey to make them public lands, and upon the extinguishment of the Indian title if within the intent of the act they would have passed under the grant, for the railroad had long since definitely located its line of road.

The proviso was inserted for some purpose: it was not surplusage: it had some definite intent. In view of what has been said, it seems to have met a situation, whether anticipated or not, in strict accord with the policy of the United States in its relations to Indian tribes. The United States in the act making the grant to claimant company was in no position to convey immediate title: it did not even know when, how, or in what manner it might ever convey the same, and it wisely circumscribed the grant by conditions, not only that the Indian title should be extinguished, but that the lands should again become part of the public domain, owned absolutely by the United States, free from incumbrance of any kind or character, and subject to its disposition without invading the rights of others or violating its obligations with respect thereto.

It is not to be presumed that the United States would, by treaty stipulations, provide lands for tribal Indians, an unlettered and dependent people, and at

the same time enact legislation which by its express terms would incapacitate it from disposing of said lands in the very manner they had expressly agreed to do. The successive acts by which the Indians received their allotments in severalty were, in effect, agreements between the Indians and the United States. The Indians did not cede title to the United States, and, if they did, it was in pursuance of an agreement not to throw said lands open to public settlement, nor to allow the United States the absolute power of disposal, but to reconvey them to the Indians in severalty, making them in no event public lands in the sense in which that term is used in referring to that particular portion of the landed possessions of the United States. If they became public lands and claimant company's grant attached, then the United States, in violation of express contracts, gave to the claimant company over 3,000,000 acres of land belonging to the respective tribes concerned therein, which some of them had occupied and owned, as Indian tribes owned land, since 1828. That it did not so intend is evidenced by the twenty-seventh section of the act of April 26, 1906 (34 Stat. 148), wherein it is expressly stated that said lands shall not become public lands nor the property of the United States. It is more consistent with the circumstances of the grant to say that the proviso was inserted for the purpose of enabling the United States to discharge its obligations under the treaties of 1866 by distinguishing between lands which are simply the property of the United States and its public lands donated to settlers and others for the purposes of internal improvements. As before observed, "if rights claimed under the Government be set up against it, they must be so clearly defined there can be no ques-

tion of the purpose of Congress to confer them". (*Leavenworth case, supra.*)

The Congress knew that in the course of time Indian tribal relations and Indian tribal lands must be segregated; that the existence of a large body of people holding immense areas of lands, free from local taxation, living thereon as a distinct and separate community, must yield to an advancing civilization. Governmental purposes required their absorption into the body politic of the nation, aside from their personal welfare. The Congress, knowing the difficulties attendant upon the extinguishment of Indian title, and the acquirement of their lands, was not willing to rest the grant of 1866 upon that contingency alone, for it was certain to happen in one way or another, but added as precautionary legislation a clause which in no wise limited them in extinguishing Indian title, but did exempt them from liability if forced to extinguish it in a manner whereby the United States acquired nothing in property. If the proviso was meaningless, merely descriptive in character, the United States placed itself in a position whereby it must assume a great liability to the claimant company or abandon its right to deal with the Indians as public policy and the sentiment of the time demanded. The Government was willing, and by the language of the act intended, to grant to claimant the lands mentioned in the act if they could by discharging their obligations to the Indians acquire this land as it usually acquired other public lands, in which event it could comply with the statute without loss to itself or incurring liabilities enormous in extent. We can not presume that the Congress did not know the extent of its liability if it rested the grant herein upon the first condition alone.

It is urged, however, that the particular portion of lands falling within the grant which were not allotted to the Indians are subject to the claimant company's grant. It is true that quite a significant portion of the Indian Territory was not allotted to the individual Indians. Townsite commissions were appointed to survey, plat and dispose of certain quantities of land for townsite purposes. The coal, asphalt and mineral lands were segregated from allotment and leased and disposed of under salutary provisions of the law to secure their full value to the Indians; in fact, provision was made for the disposition of all surplus lands over the allotments. The mode prescribed for the disposition of these lands was not essentially different, in so far as transfer of title is concerned, from that used in the case of allotment. If they ever became public lands within the meaning of the statute so did the great body of lands allotted.

The United States and the Indian tribes joined in conferring upon certain commissions, upon each of which both were represented, power and authority to lay out the townsites as therein provided, and dispose of the lots so platted at auction. Schools were to retain their locations by paying a certain amount for their lands. Cemeteries could be established by the town authorities upon certain terms and conditions. The leasing and sale of mineral lands was wisely lodged in the Interior Department. Churches were to receive their lands gratuitously. The United States had the option to purchase suitable lands for the location of courthouses, jails and other public buildings—a rather novel provision if the lands were public lands of the Government—and finally, as provided in section 17 of the act approved April 26, 1906, *supra*, all the money

arising from said sales, "or from any source whatever", was to be credited to said Indian tribes by the Treasury Department and thereafter paid to the Indians per capita. Public lands of the United States were not disposed of in this manner then, and they are not so disposed of now.

In pursuance of the general plan of allotment it was indispensable to take an equitable basis of distribution. In the agreements, ratified by Congress, it was fixed at a certain number of acres at a fixed price per acre and either the specified acreage was allotted or an increased or diminished allotment according to its appraised value. It was physically impossible to absorb the whole body of lands, even if desirable, and the surplus lands were disposed of with a view to continuing existing Indian towns and encouraging their enlargement. Indian villages had of course grown up in this large community; they were indispensable and the lands being held by communal title necessarily came within the Indian agreements with the United States. What has been said before applies to them; the United States never acquired title to them free from incumbrance; they were never conveyed or in any way ceded to the United States. The very terms of the agreement fix their status, and though disposed of to other than Indians no part of the consideration ever reached the Treasury as funds belonging to the United States. The United States, in fact transferred its title to the Indian and permitted the Indian to transfer it to another. Lands allotted to intermarried whites and former negro slaves were in the same category. The status of these people having been fixed by Indian laws, it was carried into the agreement as to allotment; they did not take by pre-emption or homestead entries or by

any manner similar to the ones used in disposing of public lands.

Again it is insisted that there rested upon the United States an implied obligation to extinguish the Indian title so the grant might attach; that the United States having prevented and made impossible of performance the condition it agreed to perform must respond in damages. It is indisputable that authority and power to deal with Indian tribes and Indian lands was lodged exclusively in the Government. The time and manner of disposition was exclusively for the United States, free from interference at the suit of private parties. If, then, an implied obligation rested upon the United States in this instance it was equivalent to saying we will extinguish title and make said lands public lands of the United States, and the language of the act as qualifying terms was meaningless. There would have been no distinction between this grant and other grants wherein the United States expressly agreed to extinguish Indian title. The case is different from an ordinary executory contract where one party refuses or renders himself unable to perform a condition he impliedly engaged to perform. It cannot be asserted that the United States impliedly engaged itself to extinguish the Indian title within a reasonable time; that was a matter within their exclusive right to determine; it could have continued the reservations indefinitely and no liability attached. It might never have extinguished Indian title and still be exempt. The condition was not one certain of performance; it was expressly contingent, and its performance was reserved exclusively to the grantor indeterminately.

The United States recognized in the second condition its right to extinguish the Indian title without in-

curring liability. If responsible obligations are to be implied the act simply postponed what was inevitable, and the claimant company was somewhat tardy in waiting forty-two years to assert its claim for damages for nonperformance of a condition within the power of the defendants to perform, and that within a reasonable time.

The Congress by the act of 1866 did not do a "vain thing". The treaties with the Creeks, Cherokees, Choctaws and Chickasaws consummated in 1866 reserved to the United States the right under certain conditions to grant extensive rights-of-way for railroad purposes through their lands. The act of 1866 transferred in almost identical terms this right to the successful competitor under the eleventh section of the act, and in addition thereto granted extensive areas of land in the State of Kansas, all of which was acquired by the claimant company. There was no possible way for the claimant company, or either of its competitors, to connect their railroad lines and reach the coast via Preston (now Denison), Tex., except by permission of the Congress to pass through Indian Territory. The keenness of the competition and the subsequent disputes relative thereto appearing in claimant's exhibits to its petition indicate the zeal of the competitors.

The claimant company accepted the grant with the conditions imposed, conditions which clearly expressed and intended to express the uncertainty of its complete realization. The United States from its very beginning had regarded its treaties with the Indians, and the Court cannot presume, nor in the absence of express language indicating an intent so to do, enlarge the terms of the granting act to cover a vast area of land solemnly dedicated at the time of the grant to Indian

tribes and for Indian purposes. If the United States so intended, apt language would have been employed, and terms of conveyance used in acts of similar character would have been used, leaving no doubt as to its purposes or what lands passed by the grant. Following the rules of construction heretofore set forth, we think the demurrer should be sustained. It is so ordered.

COURT OF CLAIMS OF THE UNITED STATES.

No. 30016.

(Decided December 4, 1911.)

Missouri, Kansas & Texas Railway Company
vs.
United States.

Howry, Judge, delivered the following opinion:

The magnitude of this cause and the importance of the issues raised by demurrer to the plaintiffs' petition of 698 printed pages of allegation and exhibit are causes sufficient to warrant full expression of opinion by any or all responsible for the result. Especially is this so because of the statement contained in the brief of one of the learned counsel that it had been said that a suit for more than $61,000,000 never had been and never could be carried through, followed by the further declaration that it had been frequently stated that if this were a suit between private parties for a moderate amount there could be no question of its receiving favorable consideration. But who said it and by what authority? And why should the courts be thus discredited? If the size of the claim could have anything to do with the result, the sooner this Court should retire from business the better for the citizen.

But any court must pause in considering so enormous a demand and be well assured of its merit before saying there is liability. Certainly statements in the nature of advance criticism cannot have the effect of preventing the proper judgment in the discharge of an unavoidable duty as that duty is understood.

Whilst concurring with many of the views expressed in the preceding opinion this opinion is submitted along somewhat different lines as covering my reasons for sustaining the demurrer to the petition.

Four great estates lying in what was formerly known as the Indian Territory (but now the State of Oklahoma) are involved. The plaintiff company, as the successor of the Kansas & Neosho Valley Railroad, claims a grant *in praesenti* of over 3,000,000 acres of land covering 4866 sections, or 135 solid townships, at the rate of 12,800 acres to the mile through 243 miles of territory beginning at the southern line of Kansas and extending to the northern line of Texas. The area attached to and with whatever passed, according to the petition, embraced alternate sections on each side of the railroad. If anything was granted, it was in the nature of a float until the lands were surveyed as public lands of the United States. Upon such survey, it is claimed, the grant specifically attached to every odd-numbered section within the 20-mile limit and the case is presented on the theory that by the doctrine of relation when the road was located, built and the lands were surveyed, the title acquired became specific, thereby reaching back to the date of the grant. This immense domain is valued at $20 an acre, for which a money judgment is asked of and from the defendants for something over $61,000,000.

Congress by an act approved July 25, 1866 (14 Stat.

236), granted, for the benefit of the original company, certain public lands in the State of Kansas. By section 1, ten alternate sections of land on each side of the road to every mile, to be selected within 20 miles of the railroad, were granted to the Governor of that State to aid in the construction of the Kansas & Neosho Valley Railroad, and in the event of such lands having already been pre-empted, it was provided that lieu lands should be selected likewise within the 20-mile limit. There was attached to this grant a proviso:

> "That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby, reserved and excepted from the operation of this act, except so far as it may be found necessary to locate the route of said road through such reserved lands, in which case the right of way, 200 feet in width, is hereby granted, subject to the approval of the President of the United States: *And provided further*, That said lands hereby granted shall not be selected beyond twenty miles from the line of said road."

Section 2 provided that the sections and parts of sections remaining should not be sold for less than double the minimum price. Section 3 provided for the free transportation of Government troops and the terms upon which the lands should be patented to the railroad and that if the road should not be completed within two years the unpatented lands should revert. Section 4 provided that as soon as the company should file its maps designating the route the lands should be withdrawn from the market. Section 5 provided

for the transportation of mails. Section 6 granted a right-of-way through the public lands 100 feet wide, with grounds for station buildings and material for construction from the adjacent lands. Section 7 provided:

> "That the acceptance of the terms, conditions and impositions of this act by the Kansas Valley road shall be signified in writing, * * * which acceptance shall be made within one year after the passage of this act, and not afterwards, and shall be deposited with the Secretary of the Interior."

The foregoing sections relate to the grant of public lands exclusively in Kansas and have no relation to grants of lands within the Indian Territory.

The sections which relate to the construction of the road through the Territory dealt with lands not public lands at the time of the conditional grant. The four sections are so entirely different in scope and effect they are set forth verbatim in the foot note[1].

[1]SEC. 8. *And be it further enacted*, That said Kansas and Neosho Valley Railroad Company, its successors and assigns, is hereby authorized and empowered to extend and construct its railroad from the southern boundary of Kansas south, through the Indian Territory, to Red River, at or near Preston, in the State of Texas, so as to connect with the railway now being constructed from Galveston to a point at or near Preston, in said State, and the right-of-way through the Indian Territory, wherever such right is now reserved or may hereafter be reserved to the United States by treaty with the Indian tribes, is hereby granted to said company, to the same extent as granted by the sixth section of this act, through the public lands; and in all cases where the right-of-way, as aforesaid, through the Indian lands shall not be reserved to the Government, the said company shall, before constructing its road, procure the consent of the tribe or tribes interested, which consent, with all its terms and conditions, shall be previously approved and endorsed by the President and filed with the Secretary of the Interior.

SEC. 9. *And be it further enacted*, That the same grants of lands through the Indian Territory are hereby made as provided in the first section of this act, whenever the Indian title shall be extinguished by treaty or otherwise, not to exceed the ratio per mile granted in the first section of this act: *Provided*, That said lands become a part of the public lands of the United States.

SEC. 10. *And be it further enacted*, That said Kansas and Neosho Valley Railroad Company, its successors and assigns, shall have the right to negotiate with, and acquire from any Indian nation or tribe, authorized by the United States to dispose of lands for railroad purposes, and from any other nation or tribe of Indians through whose lands said railroad may pass, subject to the approval of the President of the United States, or from any company or parties incorporated or authorized for such purposes, by such nation or tribe, or which such parties may have acquired under the laws of the United States.

SEC. 11. *And be it further enacted*, That any railroad company chartered under any law of the United States, or of the State of Kansas, which may have been heretofore or shall hereafter be recognized and subsidized by any act of Congress of the United States, may connect, unite, and consolidate with this railroad company, after the same shall be located to the valley of the Neosho River, upon just, fair, and equitable terms, to be agreed upon between the parties, and shall not be against the public interest or the interest of the United States; nor shall any road authorized to connect as aforesaid charge the road so connecting a greater tariff per mile for freight or passengers than is charged for the same per mile by its own road: *And provided further*, That should the Leavenworth, Lawrence and Fort Gibson Railroad Company, or the Union Pacific Railroad Company, Southern Branch, construct and complete its road to that point on the southern boundary of the State of Kansas where the line of said Kansas and Neosho Valley Railroad shall cross the same, before the said Kansas and Neosho Valley Railroad Company shall have constructed nd completed its said road to said point, then and in that event the company so first reaching in completion the said point on the southern boundary of the State of Kansas shall be authorized, upon obtaining the written approval of the President of the United States, to construct and operate its line of railroad from said point to a point at or near Preston, in the State of Texas, *with grants of land according to the provisions of this act*, but upon the further special condition, nevertheless, that said railroad company shall have commenced in good faith the construction thereof before the said Kansas and Neosho Valley Railroad Company shall have completed its said railroad to said point: *And provided further*, That said other railroad company, so having commenced said work in good faith, shall continue to prosecute the same with sufficient energy to insure the completion of the same within a reasonable time, subject to the approval of the President of the United States: *And provided further, That the right-of-way through private property, when not otherwise provided for in this act*, or by the law of any State through which the road may pass, shall be obtained by said Kansas and Neosho Valley Railroad Company, or either of the other companies named in this act, in accordance with the provisions of section three of an act to amend an act entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes," approved July first, eighteen hundred and sixty-two.

At the time of the approval of the granting act certain roads were being constructed in Kansas, viz: Atchison, Topeka & Santa Fe Railroad, the Leavenworth, Lawrence & Fort Gibson Railroad, the Union Pacific, Southern Branch, Railroad (now the Missouri, Kansas & Texas), and the Kansas & Neosho Valley Railroad. Plaintiff company, it was subsequently shown, was the first to reach the designated point on the southern boundary of Kansas and the consideration is rested upon the language that when the road was the first to complete, the grant or promise of the lands became binding and irrevocable subject to the conditions expressed in section nine. Meantime the company had negotiated with and secured the consent of the Indian nations to the right-of-way through their lands, as required by section 8 of the granting act. Thereupon the company began the work of construction and completed its line to Denison, Tex., within the required time and has since operated the line.

At the time four Indian nations possessed and occupied the lands through which the road was authorized to be constructed, to-wit: The Muskogee Nation, commonly known as the Creeks; the Cherokees, the Choctaws and Chickasaws. These people were living on lands set apart to them as a permanent home under treaties with the United States. The Muskogee Nation, or Creeks, acquired title to their lands in the Indian Territory by treaty April 12, 1834 (7 Stat. 417). Their title was defined by the natural landmarks described in article 2. Their conveyance was by patent provided for by article 3, as follows:

> "The United States will grant a patent, in fee simple, to the Creek Nation of Indians for the land assigned said nation by this treaty or con-

> vention, whenever the same shall have been ratified by the President and Senate of the United States, and the right thus guaranteed by the United States shall be continued to said tribe of Indians so long as they shall exist as a nation and continue to occupy the country hereby assigned them."

The Muskogees (or Creeks) received a patent to their lands August 11, 1852.

The Choctaw Nation went into the possession of their lands in the same Territory by virtue of a treaty with the United States, known as the Dancing Rabbit Creek treaty, dated September 30, 1830 (7 Stat. 332). Their possession was described by metes and bounds and was guaranteed to the Choctaws by article 2, as follows:

> "The United States under a grant specially to be made by the President of the United States shall cause to be issued to the Choctaw Nation a tract of country west of the Mississippi River in fee-simple to them and their descendants to inure to them while they shall exist as a nation and live on it."

Subsequently, March 23, 1842, the United States issued their patent to the Choctaw Nation in accordance with section 2 of the treaty between the parties. Subsequent to that time, January 17, 1837, the Choctaws and Chickasaws entered into "articles of convention and agreement" (11 Stat. 573), by article 1 of which it was provided:

> "It is agreed by the Choctaws that the Chickasaws shall have the privilege of forming a district within the limits of their country, to be held on the same terms that the Choctaws now hold it,

except the right of disposing of it, which is held in common with the Choctaws and Chickasaws, to be called the 'Chickasaw district of the Choctaw Nation.' "

Later, on June 22, 1855, another treaty was entered into between the United States and the Choctaw and Chickasaw Tribes (11 Stat. 611), by which the boundaries of the Choctaw and Chickasaw country were defined and secured and guaranteed "to the members of the Chocktaw and Chickasaw Tribes, their heirs and successors, to be held in common" and to "revert to the United States *if said Indians and their heirs become extinct or abandon the same*".

The Chickasaws were removed to these lands by the United States. Beginning with the treaty between those people and the United States of October 20, 1832 (7 Stat. 382), known as the treaty of Pontitoc Creek, we find the initial steps taken for their removal. They went west seeking a permanent home and it was so expressed to them by the Government. For a consideration the Chickasaw Nation ceded to the United States all the land which they owned in Mississippi. By a supplemental treaty proclaimed May 24, 1834, known as the treaty of Washington, the original treaty was modified with respect to the disposition of certain reservations in Mississippi, but the general scheme of removal was carried out. The tribe subsequently, in 1837, obtained title to land in the Choctaw country in pursuance of the original intent between the Chickasaws and the Government. The United States supervised and sanctioned the treaty between the Choctaws and the Chickasaws. The purpose then was unqualified as to any possibility of the removal of any

of these people from the country where they were located west of the Mississippi.

The title of the Cherokees to the portion of their lands involved in this case was first acquired under treaty with the United States May 6, 1828 (7 Stat. 311). Article 2 was a guaranty to the Cherokees for possession for ever of 7,000,000 acres of land. This guaranty was to "the Cherokees". And in addition to the guaranty of 7,000,000 acres the United States further guaranteed "to the Cherokee Nation" a perpetual outlet west. On February 14, 1833, a supplemental treaty was entered into whereby the United States reaffirmed the foregoing grant (7 Stat. 414), and "to possess the Cherokees, to guarantee to them forever the land therein described". Subsequently, December 29, 1835, the treaty of New Echota was made with the Cherokees residing east of the Mississippi whereby the United States guaranteed and secured to be conveyed by patent the home tract and the outlet covenanting "to convey to the said Indians and their descendants by patent in fee simple an additional tract of land" describing a tract of 800,000 acres. By the third article of this treaty it was agreed that there should be included in one patent to be executed to the Cherokee Nation all the land mentioned according to the provisions of the act of May 28, 1830 (4 Stat. 411). This act was "An act to provide for an exchange of lands with the Indians residing in any of the States or Territories and for their removal west of the River Mississippi". By section 3 of that act it was provided that

> "In the making of any such exchange or exchanges, it shall and may be lawful for the President solemnly to assure the tribe or nation with

which the exchange is made, that the United States will forever secure and guarantee to them, and their heirs or successors, the country so exchanged with them; and, if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same: *Provided always*, That such lands shall revert to the United States if the Indians become extinct or abandon the same."

By section 7:

"*Provided*, That nothing in this act contained shall be construed as authorizing or directing the violation of any existing treaty between the United States and any of the Indian tribes."

On December 31, 1838, a patent was issued by the United States reciting provisions of the treaties of 1828, 1833 and 1835 in regard to the grants of such lands.

After the close of the war between the States treaties of amnesty between the United States and the tribes whose lands are here affected were proclaimed as follows, viz: With the Choctaws and Chickasaws, proclaimed with amendments July 10, 1866 (14 Stat. 769); with the Creeks, proclaimed with amendments August 11, 1866 (14 Stat. 785), and with the Cherokees, proclaimed August 11, 1866 (14 Stat. 799). In this latter treaty the amendments offered in the Senate were not accepted by the Indians until July 31, 1866. With the Creeks, the Choctaws and Chickasaws the amendments were accepted in July, 1866.

Previous to the passage of the act under which plaintiff claims and subsequently, other acts had been passed for the construction of railroads southward

from Kansas. Under its original name of Union Pacific Railway Company, Southern Branch, it was granted lands by acts of Congress of March 3, 1863; July 1, 1864, and July 26, 1866. The first named of these acts was for the grant of land to the State of Kansas for aid in the construction of certain railroads (12 Stat. 772). Among the railroads for whose benefit aid was granted by this act was a line extending from Atchison *via* Topeka through Kansas in the direction of Santa Fe, N. Mex., with a branch from where the road crossed the Neosho in Kansas down the valley of that name to a point where the railroad, also aided by said act, extended from Leavenworth in the direction of Galveston Bay, in Texas. This was the route substantially covered by the original charter. On July 2, 1864, Congress passed another act making additional grants of land in Kansas to aid in the construction of railways. On March 19, 1866, the Atchison, Topeka & Santa Fe Railway and plaintiff entered into an agreement whereby the Atchison Company assigned all its rights in and to the lands granted by the act of March 3, 1863, and of July 1, 1864 as to the line from Fort Riley down the Neosho Valley, and known as the Neosho Valley Branch. Then came the act of July 25, 1866, *supra*, and on July 26, 1866, Congress passed another act granting lands to the State of Kansas for the construction of the Southern Branch of the Union Pacific. These lands so granted inured to the benefit of the plaintiff, and were, as alleged in the petition, parts of a general scheme and purpose, subject to the will of Congress, as I think, with respect to the outstanding claims of others.

These acts of Congress of March 3, 1863 (12 Stat. 772); July 1, 1864 (13 Stat. 339), and July 26, 1866

(14 Stat. 289), granted lands which the Supreme Court construed to be acts *in pari materia*. *Kansas City, Lawrence and Southern Kansas R. R. Co.* v. *Attorney General*, 118 U. S. 682. There was no occasion for the appellate court to allude to the lands occupied and held under treaties between the Government and the Indians, because the present controversy had not then arisen. But all these acts and Indian treaties must be considered together in disposing of the issues here to determine the meaning and intent of Congress with respect to the lands which now form the subject-matter of this controversy, because they were all under executive and legislative consideration at the same time.

In the exercise of the political power over the civilized tribes as wards of the Government, Congress provided for the appointment of a commission, known as the Dawes Commission, to enter into negotiations with the civilized tribes for the purpose of extinguishing the national or tribal title, either by cession of some part of the soil or by allotment and division among the Indians upon the acceptance by the Indians of the terms imposed. The national claim of title was superseded by the allotment of lands in severalty, and by subsequent legislation Congress declared "that the lands belonging to the Choctaw, Chickasaw, Cherokee, Creek or Seminole Tribes upon the dissolution of said tribes *shall not become public lands* nor property of the United States, *but shall be held in trust by the United States for the use and benefit of the Indians respectively comprising each of said tribes and their heirs.*"

Pending the allotment of the lands in severalty the plaintiff company gave formal notice of its claim to

the land by virtue of an act approved July 25, 1866 (14 Stat. 236). It claimed that by the performance on its part of the conditions set forth in the act mentioned an express contract founded upon the said act had been created whereby the company had acquired the title in fee simple to the lands, subject only to the communal, possessory or usufructuary rights then existing in the four nations in occupancy. It is contended that as the national tribal title of occupancy existing at the date of the grant became extinguished the company's title took immediate effect by relation as of the date of the alleged grant, and thereupon became entitled to patents.

As an alternative proposition to that alleging breach of an express contract it is further alleged that even if this proceeding "be treated as a mere suit to recover the value of lands owned by the claimant and taken by the United States, it is an action upon an implied contract and one based on the Constitution". Thus, a grant *in praesenti* of such character as to entitle the plaintiff to immediate possession, as well as to patents to the lands described in the petition, is claimed under and by virtue of alleged express covenants as well (it is further contended) on the implied promise of the Government to pay for the lands on demand, which has found expression in the present proceeding, for a money judgment against the United States.

The demurrer to the petition is made by counsel to raise two questions:

(1) Whether the claim is within the jurisdiction of the court under the provisions of the Tucker Act.

(2) Whether the petition sets forth a cause of action.

The law and the facts arising out of the allegations of the petition under the statutes and treaties affecting the issues are too intimately blended to deal separately with the matter of jurisdiction without going into the merits of the case so far as can be done properly on the demurrer.

There is authority for this course. *Fauntleroy* v. *Lum*, 210 U. S. 235. In *Louisville Trust Co.* v. *Comingor*, 184 U. S. 26, the Court declared that the power to hear and determine a subject-matter was limited in such various ways in many cases the matter of jurisdiction might depend on the ascertainment of facts involving the merits, and in that sense courts could exercise jurisdiction in disposing of the preliminary inquiry, subject to correction on a review where jurisdiction was erroneously retained by an adjudication on the merits.

But plaintiff objects to the consideration of anything in the nature of extraneous matter and seeks to restrict consideration of the case as made by the petition.

The office of a demurrer should not be undermined by the use of testimony of a documentary character which, according to the rules of law, need to be properly authenticated, but public acts and treaties affecting the issue at any stage of the proceedings cannot be excluded from consideration at any time.

Eliminating certain documentary evidence offered by defendants to qualify or contradict the statements of the complaint because not proper to be considered on demurrer, all acts of Congress relating to the alleged grant and all public treaties affecting the Indian right can now properly be considered. Judicial notice must be taken not only of the legislation treaty

agreements and contracts with all parties affected, but all matters of pubic history must be taken into account. The averments and exhibits of the petition require the Court to take an unrestricted view of practically everything material in any stage of the case.

The general jurisdiction of the Court of Claims conferred by the act of March 3, 1887 (24 Stat. 505), gives the Court authority to hear and determine:

(1) All claims founded upon the Constitution; or, upon any law of Congress except for pensions.

(2) Those founded upon any regulation of an Executive Department.

(3) Or those founded upon any contract, expressed or implied, with the Government of the United States.

(4) Or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress either in a court of law, equity or admiralty, if the United States were suable.

For and against jurisdiction under the Tucker Act of 1887 (24 Stat. 505) a large number of authorities have been cited. In support of the demurrer defendants particularly rely upon the following: *Langford's case*, 12 C. Cls. R. 338, 101 U. S. 341; *Bethlehem Steel Co.* v. *Same*, 41 *ib.* 19, 205 *U. S.* 105; *Hollister* v. *Benedict Mfg. Co.*, 113 *ib.* 59; *United States* v. *Palmer*, 128 *ib.* 262; *Hill* v. *United States*, 149 *ib.* 593; *Schillinger* v. *Same*, 155 *ib.* 163; *United States* v. *Berdan Fire Arms Co.*, 156 *ib.* 552; *Dooley* v. *Same*, 182 *ib.* 222; *Russell* v. *Same*, 182 *ib.* 516; *Bigby* v. *Same*, 188 *ib.* 400; *Harley* v. *Same*, 198 *ib.* 229.

In support of the sufficiency of the allegations of the petition plaintiff relies upon the following, viz: *Brown* v. *United States*, 6 C. Cls. R. 171; *United States*

v *Cartner*, 38 Fed. Rep. 1; *Choctaw Nation* v. *United States*, 119 U. S. 1 *et seq.*; *United States* v. *Great Falls Mfg. Co.*, 112 U. S. 645, 16 C. Cls. R. 160; *New York Indians* v. *United States*, 170 U. S. 1 *et seq.*; *United States* v. *Lynah*, 188 U. S. 445; *The Milliken Imprinting Co.* v. *United States*, 40 C. Cls. R. 81, 202 U. S. 168; *State of Kansas* v. *United States*, 204 U. S. 331.

It would not be profitable to review the many cases relating to the jurisdiction under the Tucker Act of 1887. Several relating to the general jurisdiction of this Court under the act mentioned, including a number of those cited by the respective counsel, were specifically considered in Lynah's case, 188 U. S. 445. It is enough now to say that some of the cases relied on relate to express contracts and some to the right of the parties to recover upon the implied promise to pay; some are for the taking of land for public improvements, while others relate to compensation for the alleged appropriation of rights under patents, while there are yet other cases of a class presenting questions of a character quite different from the case at bar.

It is true, as said by some of the counsel, that the case here is so unique that there is nothing like it to be found in the books. Yet in many respects it is a case which cannot be regarded as so unusual that precedents cannot be applied.

There is no room for any alternative proposition as upon an implied contract. It is a rule of ancient pleading sanctioned in modern practice that parties cannot be bound by implied promises when express contracts have been made as to the same subject matter. Chitty said that this proposition was certainly sound law unless the express contract be rescinded or

abandoned. So, where an express written contract exists the complaining party must declare upon the written agreement so long as the special agreement remains in force, and under such circumstances such party cannot recover upon a *quantum meruit*. The principle has met the approval of the Supreme Court when it declared the Chitty rule that implied promises in law exist only where there is no express promise—*expressum facit cessare tacitum*. *Hawkins* v. *United States*, 96 U. S. 218.

Applying these principles, there is no implied contract, and the cause must stand on the alleged express agreement for whatever there may appear to be respecting a breach. If there is a breach, the action must only lie for that breach; but if there be no breach, no action will lie for the implied assumpsit until it be shown that the parties have either abandoned the express agreement or have so rescinded or modified it as to give rise to a necessary implication.

In *Hartley's case*, 39 C. Cls. 114, Nott, Ch. J., said that implied contracts are of two kinds. The first is where a man has tortiously taken property and the owner waives the tort and sues in assumpsit. In such cases there is no meeting of the minds. Such cases, said this Court, rest upon the principle that if the owner chooses to waive the tort and sue for the money derived from his property in the defendant's hands, the defendant cannot set up his own unlawful conduct as a defense. The second kind of implied contracts, continued the writer of that opinion, "is where the parties met and their meeting resulted in a wordless agreement".

But this is a suit against the United States first upon an express contract and as an alternative upon

an alleged implied agreement. The double method of proceeding is inconsistent. If there was an express contract founded upon a law in favor of the company, the plaintiff not only does not abandon it, but stands upon what it says is an express agreement. If there was no express contract, it is not apparent how the jurisdiction can be asserted for the taking of the lands claimed, inasmuch as the action is against the Government and there is no implied promise to pay; but, according to the petition, an express promise on the part of the Government to do so.

Individuals may sometimes waive a tort and sue in assumpsit, but where there is a tortious taking by the United States the wrong cannot be so waived as to warrant an action under the provisions of the Tucker Act. In so far, then, as this action rests upon the alternative proposition asserted as upon an implied promise the jurisdiction is wanting. *Russell* v. *United States*, 182 U. S. 530; *Harley* v. *Same supra*, 198 U. S. 234.

As to the second kind of implied contracts where parties have met but their meeting resulted in a wordless agreement, there can be no room for the statement that jurisdiction can be maintained under plaintiff's alternative proposition, because the company's entire case comes back to the express agreement. It is that which must be enforced, if anything can be.

No clearer statement can be found relating to jurisdiction than that stated in *United States* v. *Jones*, 131 U. S. 16, where the Court said that the circuit and district courts had concurrent jurisdiction, within certain limits as to amounts, to render judgments on money demands, but the power of those courts was no broader than the jurisdiction of the Court of Claims

to render judgments for the larger amounts of which this Court has jurisdiction: and that "claims redressable in a court of law, equity or admiralty may be claims for money only, or they may be claims for property for specific relief, according as the context of the statute may require or allow". Other cases practically repeat this phase of the matter under the provisions of the Tucker Act, viz: *United States* v. *Behan*, 110 U. S. 338; *United States* v. *Great Falls Mfg. Co.*, 112 *ib.* 645; *Hollister* v. *Benedict*, 113 *ib.* 67.

If, then, plaintiff's title became complete by the lawful merger of the Indian title with such reversionary interest as the railroad acquired from the United States—that is, if divesting the Government of all its interest in the lands by the act of July 25, 1866, the United States lawfully extinguished the Indian titles and also converted the land now claimed into the public domain of the Government—the railroad interest became vested and there arose a breach of an express contract for the value of the land for which a judgment sounding in damages for money can be entered.

No question of tort is involved under the provisions of the Tucker Act if full and complete title became vested in the railroad by contract; or, in other words, if the railroad acquired such a title that the lands became a property right which the company could assert by due process of law at the time of the filing of the petition. There is thus presented the broad question as to whether the claim of the plaintiff be justiciable linked as this question necessarily is with the intent of Congress in the passage of the act upon which the claim of title is predicated and with the constitutional power and authority of Congress to make the allotments and reservations as appears to have been done.

Assuming that the Government parted with the fee, the question is whether there was not yet left the transcendent power of the Legislature to carry out contemporaneous obligations with others.

It is well to observe here that a claim against the United States for a specific amount of money which is not expressly or by necessary implication authorized by a valid enactment of Congress cannot be said to be founded on the Constitution. *Hooe v. United States*, 218 U. S. 322. And where the United States have not acknowledged any right of property in a petitioner the case is one sounding in tort, of which this Court has no jurisdiction under the act of March 3, 1887. *Hill* v. *United States*, 149 U. S. 593.

By the Constitution Congress became invested with the power to deal with the Indian tribes, and the question arises whether the courts can deny the validity of acts of Congress where, pursuant to treaties in existence at the time of the passage of the alleged granting act, the legislative body undertook to carry out the provisions of those treaties for the benefit of the then occupants of the lands. In other words, can it be said that the claim of the plaintiff is justiciable?

When the company proves, if it can prove, that the conditions imposed by the act of July 25, 1866, have happened there is jurisdiction to proceed as for a breach. The fulfillment of the conditions of the grant sufficiently acknowledges on the part of the United States plaintiff's right of property created by the grant, but otherwise not.

Here the Government does not claim to own the fee to the lands or to have any interest in them and in this respect the matter of tort is unlike *Langford's Case*, 101 U. S. 341, and unlike *Hill* v. *United States*,

149 U. S. 593. The rule deducible from these and other cases was stated in the leading case of *United States* v. *Lynah*, *supra*, where the Court said that "if an officer of the Government takes possession of property under the claim that it belongs to the Government (when in fact it does not), that may well be considered a tortious act on his part", for the reason that there could be no implication of an intent on the part of the Government to pay for that which it claims to own. In the present case the strong arm of the Government has been interposed for the protection of the wards of the nation and to carry out treaty rights contemporaneously made with the grant to the railroad (previously as well), conceding rights to the occupants of the land. This statement brings us to the allegations respecting the course of the Government in making the allotments, and reserving by its other legislation other lands for the benefit of the occupants and the refusal of the defendants to make the lands public lands of the United States.

This phase of the matter will be understood better after considering the terms of the grant and the existing treaties together. The suggestion in its nature is jurisdictional, to be sure, but does not involve defendants in anything tortious unless it be shown that the Government had no power to execute its treaties because of the grant.

All parties are agreed that section 9 is the vital section.

Plaintiff's contention is that upon the transfer of the tribal title to the members of the tribe the nations lost their interest in the lands and the individual occupants acquired none, but that the railroad acquired a complete title. By relation is meant an act done at one

time operating upon the thing as if done at another time. The authorities hold that the doctrine is a fiction of law for the promotion of justice *and of the lawful intention of the parties* by giving effect to acts or instruments which, without it, would be invalid. We are thus brought to two crucial questions; that is, as to the intent of Congress in the passage of the act, and, next, as to the proper construction to be given to the act itself.

The civilized tribes had forfeited no rights secured to them by previous treaties because of their participation in the war which had just ended. It is true that the majority of the occupants of the land had, in the war between the States, taken up arms against the Government, but many of these occupants did not do so. It is historical that many occupants of the lands had during the war gone northward, but returned after the close of hostilities. But none of the occupants of the lands were hostile in 1866, and the evidence of this is that by new treaties rights acquired under former treaties were affirmed in July, 1866, upon certain conditions relating to the former slaves of the tribes, to whom property, as well as political rights, were given. The scope and effect of these new treaties was to put the world on notice that Government authority would continue to be exercised over permanent occupation of all lands not taken over absolutely at that time in virtue of the new treaties by the United States. Amnesty was extended to every participant in the struggle of the sections. None of these treaties meant forfeiture of previous Government obligation or Government interference with rights acquired under outstanding patents promised or granted by previous treaties.

The granting section carries words of absolute donation. *Railroad Co.* v. *Smith*, 9 Wall. 95; *Schulenberg* v. *Harriman*, 21 *ib.* 60; *Leavenworth R. R. Co.* v. *United States*, 92 U. S. 733. The language implied present conveyance of the fee but subject to conditions liable never to happen. That is, the Indian title had to be extinguished and the lands had to become public lands, but nothing attached to any of the alternate sections until there was a survey of the lands *as a part of the public domain of the United States*, the road having been located. But as said in the case of *Rice* v. *Railroad Co.*, 1 Black 380, and repeated in the Leavenworth case, *supra*, the grant embraced such lands as could be sold and enjoyed and not those which the Indians, pursuant to treaty stipulations, were left free to occupy.

When learned counsel say it is immaterial whether the railroad claim be a grant *in praesenti*, or a grant *in futuro*, by what name the grant be called the concession would seem to follow that the granting act on its face involved contingencies too indefinite to have constituted a present or prospective transfer perfect enough to be called a statutory grant of an interest. Whilst contending that the railroad acquired the reversionary interest of the United States they appeal to the rules of the common law, citing 2 Blackstone, c. 2, where the commentator says:

> "An estate in reversion is the residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him. Sir Edward Coke describes a reversion to be the returning of land to the grantor or his heirs after the grant is over."

When this act was passed the Government had al-

ready agreed never to assert the residue of any estate for itself so long as the occupants observed their treaties by remaining in possession.

But the learned commentator also says that "The fee-simple of all lands must abide somewhere": and that "A reversion is never created by deed or writing, but arises from construction of law". In *Wallach* v. *Van Riswick*, 92 U. S. 212, the Supreme Court recognized the common-law rule that a fee cannot be in abeyance, though the reasons the Court said were not to be of universal application because a common-law maxim must yield to statutory provisions inconsistent with the rule. Is there then anything in this alleged statutory contract inconsistent with the rule?

The act on its face only purported to grant the naked fee clouded by conditions and qualified by terms which left the grantor free to carry out the previous (and also contemporaneous) pledges of the Government to those already occupying the lands. The Government did not in the passage of the act divest itself of control. If it did, then the grantee had the better and superior right to assume control. The manner, time and conditions of extinguishing the right of occupancy were exclusively matters for the consideration of the Government, and could not be interfered with nor put in contest by private parties. *Buttz* v. *Northern Pacific Railroad*, 119 U. S. 55.

If the conveyance of the reversionary interest operated as a present grant of the fee then there was presented the anomaly of the remainderman asserting ownership, with the power reserved by the grantor not only to remain in present control but in control for all time as well, *for the want of a promise to ever determine the period of existence of the particular estate.*

When conditions were annexed to this act by which the grantor could exercise the option of never determining the duration of the particular estate, the remainder attempted to be created or acquired is quite unlike those cases where the particular estate is given for the life of a person with remainder to another; or those cases where two persons hold the precedent estate as tenants for their joint lives remainder over to the survivor in fee. Freeholds in some of the States may commence *in futuro*, by deed or will, with or without the intervention of a precedent estate, but here the grant of the reversionary interest of the United States does not appear to have been the disposition of an estate in remainder, because an estate in remainder cannot commence *in futuro*. The question then arises whether the sovereign power possessing the fee by retaining the right to render its conveyance of that fee nugatory and of no avail to the grantee because of agreements with others, did not create such a float as to keep the fee in that kind of abeyance as to amount to no grant at all. The intangible and unenforcible right appeared to be in the railroad (indefinitely suspended), but the right of control and ultimate disposition remained with the sovereign, for the benefit of those in possession whose title was as sacred as the fee itself.

This part of the discussion may be unnecessary and as beside the questions arising as to the happening of the conditions imposed.

But the nature of the alleged grant derives its preliminary importance from the character of the estate implied by the language of the granting act. In *Doe v. Considine*, 6 Wall. 476, the Supreme Court quoted

with approval the rule as to when a remainder vested. The Court said:

> "Where a remainder is limited to take effect in possession, if ever, immediately upon the determination of a particular estate, *which estate is to determine by an event that must unavoidably happen by the efflux of time*, the remainder vests as soon as the remainderman is *in esse* and ascertained, provided," etc.

In the case at bar the Indian estate could not be determined (according to the Supreme Court) except by a voluntary cession of the land, or by abandonment (thereby surrendering the benefit of treaty rights), or except by the arbitrary exercise of the power of Congress. As the sovereign annexed conditions to the grant before the railroad title could become perfect, and these conditions could only happen by the destruction of outstanding treaty obligations with the occupants, the interest acquired by the railroad under the rule stated cannot be said to have become vested. There was an absence of any covenant that the particular estate would ever terminate. How and when was this event, the determination of this particular estate, *unavoidably to happen* if the obstacles interposed by the treaties and by the language of the grant left it in doubt whether the event could happen at all so as to vest any title in the railroad? The Supreme Court has said, 6 Wall., *supra*, that estates in abeyance were never favored, thereby standing upon the common-law rule.

Parenthetically, the railroad can hardly claim that the Government plea of the Indian right is wanting in that exalted morality which the railroad claims for itself. While it is true that governments may break

treaties and that our own Government has occasionally exercised the right to terminate protocols and like obligations with foreign governments as well as with our domestic tribes, the political power never does so except for the best of reasons and for causes plainly declared in unambiguous language. There are no instances where governments promise to break treaties; otherwise they would not be made.

The established rule of construction is that where there is uncertainty of the right of enjoyment the remainder is a contingent and not a vested remainder. While the Supreme Court in *Kansas* v. *United States*, 204 U. S. 331, dealt solely with the question of the original jurisdiction of the appellate tribunal in a case involving these very lands, there is contained in the opinion of that Court the statement that if the allotments made to the individuals of these tribes should be taken from them (as a part of the relief sought by the bill then before the Court) the United States would be subject to a demand from them for the value of the lands taken or for other lands involved. It is plain, then, that there was even from the railroad point of view uncertainty arising on the face of the act under which the grant is claimed as to which had the better right of enjoyment of the lands. With possession and the right of possession under treaty with the United States and properly claiming as individuals the heritble right of enjoyment until in the course of nature the individual beneficiaries became extinct or abandoned the use, a clear case is presented when we say there was enough uncertainty of the right to enjoy the benefit of the lands on the part of the railroad to say that no such estate vested in this plaintiff as the company can now assert.

There are cases where out of the terms of an express contract an implied obligation arises and becomes part of the contract itself. For example, in every lease there is, unless excluded by the operation of some express covenant or agreement, an implied obligation on the part of the lessee to so use the property as not unnecessarily to injure it. Obligations implied against citizens will be implied against the United States, *but the circumstances must be the same*, 94 U. S. 53. The principle also obtains that if a precedent act is to be performed *at a certain time or place* and a strict performance of it is prevented by the absence of the party who has a right to claim it, nonperformance of the condition cannot be pleaded. *Williams* v. *Bank*, 2 Pet. 76. But to say that the language used in the act of July 25, 1866, raised an implied obligation on the part of the Government to extinguish titles and make the lands public lands for the benefit of this railroad is also to say that Congress committed the Government to a gross breach of public faith with the occupants of the lands at the time of the passage of the act. The Government did not do that. There was no pledge given by the United States by this grant as in *Buttz* v. *Northern Pacific R. R.*, 119 U. S. 57, where it appeared that there was a stipulation for extinguishment and the Sioux had retired from the lands by agreement with the United States. The circumstances are too essentially different for any court to say that an implied contract could possibly grow out of language designed to prevent the contention for the thing now asserted.

There ought to be in this day and time no room for misunderstanding as to the nature of Indian titles. Beginning with the case of *Johnson* v. *McIntosh*, 8

Wheat. 543, and sustained by a long course of decision the principle is well established that the aboriginal title by virtue of occupancy became as sacred as the fee of the United States; that the Indian right of occupation has always been heritable but inalienable, and when abandoned by the occupants, possession attached itself to the fee. *United States* v. *Cook*, 19 Wall. 593; *Jones* v. *Meehan*, 175 U. S. 1; *United States* v. *Winans*, 198 *ib.* 373.

This heritable and sacred right has from time to time been emphasized by the policy of the Government in making treaties with aboriginal occupants. The primitive control of the uses made of these lands passed by the treaties with the civilized tribes from the communal owners and became lodged in the Government of the nations for the use of their members.

In *Holden* v. *Joy*, 17 Wall. 211, the Court said that it was not important as between the parties in that case whether the title in dispute "was a fee-simple or an Indian title of occupancy or some other title", but that the Indian tribes were capable of taking as owners in fee-simple lands by purchase where the United States in form, for a valuable and declared consideration, sold such land to them. Considering that the civilized tribes yielded their possessions east of the Mississippi River for lands which they now occupy under treaties with the United States guaranteeing possession of the lands so occupied at the present time, the consideration was given because the treaties declared a consideration.

In *Leavenworth R. R.* v. *United States*, 92 U. S. 733, the Court said that upon every principle of natural right lands dedicated to the Indian use should be carefully guarded by the Government and saved from a

possible grant, and that "as the transfer of any part of an Indian reservation secured by treaty would involve a gross breach of public faith the presumption is conclusive that Congress never meant to grant it".

In *Slidell* v. *Grandjean*, 111 U. S. 437, the Court declared that as nothing could be inferred against the State, that construction should be adopted which will support the Government rather than the individual where there is doubt as to the meaning of the terms of the statute granting public property to an individual. The Court also thought the rule to be wise because such a rule serves to defeat any purpose concealed by the skillful use of the terms to accomplish something not apparent on the face of the act. Whether, in the present case, the agents of the railroad procured the passage of the act under which the claim is made or not, we still have before us the further opinion of the Supreme Court that acts granting public property are usually drawn by interested parties, who are presumed to claim all they are entitled to.

In *Cherokee Nation* v. *Kansas Ry. Co.*, 135 U. S. 656, the Court valued tribal patents from the United States as the equivalent of holding the lands in fee simple, saying that the lands of the Cherokee Nation, like lands held by private owners everywhere within the geographical limits of the United States, were held subject to the authority of the general government in the exercise of the right of eminent domain to take them for such objects as were germane to the execution of the powers granted to it, provided only that the lands were not taken without just compensation being made to the owner.

The statutes of the Cherokees, for example, afforded evidence of a status, by virtue of treaties, somewhat

different from the rights enjoyed by the aboriginal occupants. While the title to the lands passed from the communal owners and became lodged in the Indian governments for the use of the members of the tribe, these statutes were adopted under treaties for the better government of the individual Indians through the agencies of their own governments. In affirming this Court in the case of *Journeycake*, 28 C. Cls. R. 302, 155 U. S. 206, the Supreme Court referred to the lands patented to the Cherokee Nation and said that the millions of acres of land appropriately styled common property of the Cherokee Nation and known as *its* public domain belonged to the Cherokees as a nation and that "the public domain of the Cherokee Nation is analogous to the public lands of the United States or the demesne lands of the crown held absolutely by the Cherokee Government, as all property is held, *a trust* for governmental purposes and to promote the general welfare".

In the case of *The Delawares*, 38 C. Cls. R. 249, which was affirmed by the Supreme Court, it was said by this Court that the Cherokee Nation, in the policy of their national development, had granted a fee-simple in one part of their country as to the rights of those members of the tribe desiring a change of their habitat and to another depending on the location of the grant a different tenure of right or estate, and that they were within the terms of one grant and omitted as to the other.

In *Spaulding* v. *Chandler*, 160 U. S. 406, the Supreme Court referred to certain orders relating to an Indian reserve and declared that the operation of those orders was clearly postponed until after the extinguishment of the reserve either by a voluntary ces-

sion to the Government, a cession or abandonment of the use, or the arbitrary exercise by Congress of its power to appropriate the lands. I am not unmindful of the case of *Fleming* v. *McCurtain*, 215 U. S. 56, where it was decided that a treaty conveying a tract to the Choctaw Indians in fee-simple to them and their descendants was a grant to the Choctaw Nation only; and that it did not create a trust for the individuals then comprising the nation and their respective descendants. In that case, however, it was made to appear that plaintiffs did not claim under any title to be derived from the statute providing for distribution according to the rolls of citizenship, nor did the bill attempt to bring plaintiffs within any grant later than the treaty and patent discussed by the Court.

In the case at bar Congress manifested a clear purpose to abide by its treaties with the occupants of these lands at the time of the passage of the act of July 25, 1866. Taking the occurrences altogether, the purpose was made plain that there was no intent to take advantage of any of the tribes. The proof of this intent is found in that requirement that before the railroad company could secure even the right-of-way through the lands from the Kansas line to the Texas border the consent of the occupants had first to be obtained unless the government reserved the right to grant by previous treaty. It would be a violent assumption to hold from the language of the act and from the circumstances surrounding its passage that Congress would impose the requirement on the railroad to obtain the Indian privilege of building and then, by another section, leave open the right of the company to take possession of every alternate section for a distance of 243 miles without the consent of the tribes

who had become possessors of the soil with such a title as the Government was recognizing to be as sacred as the fee.

In reassuming the obligations of previous treaties with the Cherokees and the other three tribes contemporaneous with the passage of the alleged grant to the railroad, Congress manifested a clear purpose to grant nothing except by the consent of the tribes.

This, by Article XI of the new treaty with the Cherokee Nation the United States stipulated that the road when built and operated should be subject to the Indian intercourse laws, and by the treaty itself the concession of the Cherokees only embraced a right-of-way not exceeding 200 feet wide except at stations, switches, water stations, or river crossings where more land might be indispensable, and then only 200 feet additional was provided to be taken if reserved by treaty, and by consent if not.

By the new treaty with the Choctaws and Chickasaws the United States also stipulated for a right-of-way through their lands to any company or companies authorized by Congress to undertake to construct roads through those nations, and when constructed such railroads were to be subject to the laws relating to intercourse with Indian tribes.

The United States by its new treaty with the Creek Nation stipulated for the right-of-way through their lands to any company duly authorized by Congress, but subjecting the road and its employes, as in other cases, to the laws relating to intercourse with the Indian tribes.

By section 8 of the act of July 25, 1866, this Kansas & Neosho Valley Railway was authorized to extend and construct its road as stated in the petition

with right-of-way through the Indian Territory wherever such right is now reserved or may hereafter be reserved to the United States by treaty with the Indian tribes to the same extent as granted by the sixth section of the granting act through the public lands; and in all cases where the right-of-way should not be reserved to the Government the said company should before constructing its road secure the consent of the tribes in interest. Evidently the language of this section 8 was incorporated in the granting act to carry out the terms provided for by the new treaties with the occupants of the lands. Accordingly, these treaties must be taken *in pari materia* with the granting act because they were all under consideration by Congress at the same time and related to the same subject-matter. No other view can be taken, because by section 10 of the granting act of 1866 it was declared:

> "That said Kansas City & Neosho Valley Railroad Company, its successors and assigns, shall have the right to negotiate with and acquire from any Indian nation or tribe, authorized by the United States to dispose of lands for railroad purposes, and from any other nation or tribe of Indians through whose lands said railroad may pass, subject to the approval of the President of the United States, or from any company or parties incorporated or authorized for such purposes, by such nation or tribe, or which such parties may have acquired under the laws of the United States."

The United States by its new treaty with the Cherokees in Article XX provided that whenever the Cherokee National Council should request it the Secretary of the Interior should cause the country reserved for the

Cherokees to be surveyed and allotted among them at the expense of the United States.

By its new treaty with the Chickasaws and Choctaws it was provided in section 2 of article I that the lands occupied by those treaties, as described in the treaty of 1855, were held in common, that it would promote the civilization of said nations and be to their best interests to have their lands allotted to individual members of the tribe in severalty. It was further provided by articles 11 to 36, inclusive, that their lands should be allotted in severalty and surveys made in the same manner that public lands of the United States were surveyed. Article 33 provided:

> "All lands selected as herein provided shall thereafter be held in severalty by the respective parties, and the unselected lands shall be the common property of the Choctaw and Chickasaw nations in their corporate capacities subject to the joint control of their legislative authorities."

In *Minnesota* v. *Hitchcock*, 185 U. S. 402, the Supreme Court alluded to allotments made in severalty and as containing something attempted more than a provision for the material wants of the Indians and declared it to be a duty for the Government "to secure to the Indians all that by any fair construction of treaty or statute can be held to have been understood by them or intended by Congress".

It is impossible to resist the conclusion that there was nothing in the nature of an absolute grant to the plaintiff company creating contractual rights or to believe that the Government bound itself to extinguish the Indian title or to make their lands a part of the public domain of the United States.

How can it be said in view of the language of these

treaties that there was any promise to any railroad to break other obligations for the benefit of a private company acquiring large bodies of land elsewhere and building roads to join with those being built in Texas northward?

But while the railroad admits that its title is derived from the ninth section of the act of July 25, 1866, counsel also contend that section 11 is fundamental and established the consideration for the grant or promise contained in section 9 which, when duly performed, made the grant or promise binding and irrevocably freed from any other conditions or restrictions than those contained in section 9. They deny that the proviso in section 1 applies to the language of the grant claimed under section 9 declaring that the reference in section 1 relates to the area of the grant alone. But the area is definitely fixed by section 9 "not to exceed the ratio per mile granted in the first section of this act".

The proviso to section 1 is as follows:

> "*Provided*, That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby, reserved and excepted from the operation of this act, except so far as it may be found necessary to locate the route of said road through said reserved lands, in which case a right-of-way 200 feet in width is hereby granted, subject to the approval of the President of the United States."

As all the lands in the Indian Territory had already been reserved to the occupants, and that, too, by treaty,

there was nothing upon which section 9 could operate until the Indian title would be extinguished and likewise until the land became a part of the public lands. On this point I think the contention of the Government is sound. The reference in section 9 cannot be made to apply to a single part or portion, but must be applied as far as possible to section 1 in its entirety, including each and every proviso forming a part of section 1. Taking the two sections and construing them together in the light of the treaty obligations assumed by the United States to the occupants, the purpose of Congress in incorporating the reference in section 9 was to throw around these occupants additional safeguards for their continued, permanent use of the lands, and were designed to exclude the construction of the terms of the alleged grant for which the plaintiff company is now contending.

The exception created by the proviso of section 9 is practically claimed to be without meaning, if the statement be true that by the doctrine of relation the title acquired by the grant became specific and related back to the date of the grant when the road was located and built and surveyed. The effect of this argument, if true, would be to wipe out the two conditions.

Again, it is contended that the extinguishment of the Indian title made the lands part of the public lands of the United States. If so, what would be the occasion for the use of the second condition as a separate proposition?

The title of an act cannot be used to extend or to restrain any positive provisions contained in the body of an act. The title is only useful when the meaning of statutory provisions be doubtful, and even then is of little weight. *Hadden* v. *The Collector*, 5 Wall. 107;

Goodlett v. *Louisville Ky. Co.*, 122 U. S. 391. Ambiguity must be in the context and not in the title. *United States* v. *Oregon Co.*, 164 U. S. 526. The title of the act before us providing for the extension of the road to Red River would apply as well to the grant of lands in Kansas to the railroad as to the grant claimed through the Indian Territory.

Considering the obligations of the treaties and their scope, that the real interest in the lands as a permanent home had been conferred upon the individual occupants; that the organized national tribal governments held the patents for the actual use of the memberships of the four nations, the purpose of the United States was at the time of the passage of the act of July 25, 1866, as reasonably certain as when but recently the Supreme Court decided that by the act of April 26, 1906, 34 Stat. 137, Congress had not released control over the lands occupied by one of these tribes (the other three being on the same footing), notwithstanding the bestowal of citizenship upon the individuals. *Tiger* v. *Western Investment Co.*, 221 U. S. 287. By the allotments there was no such extinguishment of the title of the beneficiaries in the occupancy of the lands as will permit plaintiff now to be heard to say that the first condition of the act of July 25, 1866, has been met. The subsequent legislation of Congress relating to these titles, and which counsel say can not affect the case, not only can but must be considered to assist in the interpretation of the prior legislation—a rule which the court must follow, as the Supreme Court has said in the last case cited.

The second condition set forth in the act of July 25, 1866, is of equally large import. Before this grant could take effect the lands asserted under the grant had

to become public lands. But it is argued that "nothing can be clearer" than that Congress meant in the act of July 25, 1866, that when the tribal Indian title was extinguished, nothing else having supervened, the lands would be public lands of the United States, and that nothing else ever did supervene; and that in fact, they were, immediately upon the extinguishment of the Indian title, used as public lands, subject to the uncontrolled exercise of the absolute power of the United States. But this uncontrolled and absolute power of disposition was for the use of the real beneficiaries of the title in furtherance of the pre-existing treaty agreements. The lands were neither used as public lands of the United States nor ever expected to be opened to the public. All the people have an interest in the public lands of the United States. They are held in trust for the people of the whole country. *United States* v. *Trinidad Coal Co.*, 137 U. S. 170.

The Government exercised the conceded power by virtue of the relation of the United States to the four tribes in their corporate capacity to convert the national tribal title to the use of the individuals of the tribes. The United States thereby abrogated the relation involved in the national or tribal holding in favor of the original beneficiaries. It has already been pointed out that the lands comprise the national domain of the tribes in their corporate capacity. It was corporate property of the Indian governments limited to uses of the individuals which made those governments a necessity for the welfare of the individual occupants.

If, for the sake of the argument, it be conceded that the Indian title was extinguished it does not follow that the lands did thereby become public lands because the

extinguishment of the tribal title and the lands becoming public lands are not synonymous terms. The soil was not subject to absolute disposal of the United States without ignoring treaty rights which the occupants never supposed they could be called on to surrender. The condition that the lands should first become public lands is a separate and independent condition with but one meaning. To become public lands within the meaning of the act of July 25, 1866, the Government would have had to exclude the occupants from the alternate sections claimed under the grant and open these lands to public entry. That result was clearly never contemplated because Congress knew and claimant also knew that there were outstanding patent rights which Congress reserved to deal with according to exigencies of public policy for the interests of the individuals of the nations who held the patents. These patents were in the nature of quitclaims of the United States subject to the rights of third parties holding prior claims to the lands but to no others.

It is claimed that at the time of the alleged grant there was in force an act passed in 1864, 13 Stat., 41; sec. 2115, R. S., which provided that:

> "Whenever it becomes necessary to survey any Indian or other reservations, or any lands, the same shall be surveyed under the direction and control of the General Land Office, and as nearly as may be in conformity to the rules and regulations under which other public lands are surveyed."

This statute does not specifically declare that the lands patented to the civilized tribes were public lands of the United States. Public lands are subject to preemption. These lands were not. The allotments cer-

tainly were not. The proceeds of the lands not needed for allotments were reserved for the occupants pursuant to the higher obligations stated.

The requirement of the proviso that the grant was not complete until these patented lands to the Indian occupants were made public lands of the United States was a legislative declaration and absolute notice that they were not public lands when the granting act was passed but had to become so, if at all, by subsequent legislation.

While learned counsel contend that it will not do to apply the ordinary technical rules and definitions found in other cases involving public lands to a case like this, they also concede that the use of the phrase "public lands" is not governed by an ironclad and inflexible definition, but that it depends upon the facts of each particular case. In *Union Pacific Co.* v. *Harris et al.*, 215 U. S. 386, the Supreme Court said:

> "What is meant by 'public lands' is well settled. As stated in *Newhall* v. *Sanger*, 92 U. S. 763, 'The words "public lands" are habitually used in our legislation to describe such as are subject to sale or other disposal under general law.'"

That case also recited that if in any given case the words are used in a different meaning it should be apparent either from the context or from the circumstances attending the legislation; and "while the power of Congress over lands which an individual is seeking to acquire under either the pre-emption or the homestead law remains until by the payment of the full purchase price required by the former law or the full occupation prescribed by the latter, yet under the general land laws of the United States one who, having made

an entry, is in actual occupation under the pre-emption or homestead law cannot be dispossessed of his priority at the instance of any individual," citing Hastings v. Whitney, 132 N. D. 363, 364. If, then, "one who has taken land under the pre-emption or homestead law acquires an equity of which he can not be deprived by any individual under the like laws," how much stronger is the case at bar where there was not only an equity arising out of the considerations which took the occupants from their old homes east of the Mississippi River to their new domiciles in the west, but an agreement based upon treaty which operated to prevent any grant intertering with the rights thus acquired. In *Bardon* v. *Northern Pacific R. R. Co.*, 145 U. S. 538, public land was defined to be such land as is open to sale or other disposition under general laws. It is not doubted that the United States had power to trample upon its treaty obligations and make the lands of the civilized tribes a part of the public domain of the Government, but there was every intendment to the contrary by the long series of treaties made with these occupants and finally a complete settlement of the question by the action of Congress in continuing the use of these lands according to the spirit of the treaties. In *Barker* v. *Harvey*, 181 U. S. 490, it was distinctly enunciated that lands burdened with a right of permanent occupancy were not a part of the public domain subject to full disposal by the United States. In *Missouri, Kansas and Texas Ry. Co.* v. *Roberts*, 152 U. S. 119, it was said that if the reservation there named was intended as a grant * * * it could only apply to such lands as were public lands, for no other lands in our land system are subdivided into sections, nor could it embrace lands which had been set apart

and reserved by statute or treaty with them for the use of the Indians, as was the case with the lands in this controversy. It is insisted finally, that the conditions precedent can not be insisted upon to defeat the railroad claim (if it be held that the Indian title has not been extinguished or that the lands have not become public lands), because of the rule that no party to a contract can insist on the fulfillment of a condition, the happening or execution of which it renders impossible.

There are cases of private right where it appears that if a party to a contract who is entitled to the benefit of a condition upon the performance of which responsibility is to arise dispense with, or by act of his own, prevent the performance, the opposite party is excused from proving a strict compliance with the condition. These cases, however, rest upon contracts containing covenants by the grantor to bring about the event on the happening of which his obligation depends or covenants necessarily implied from the terms of the agreements of the parties.

It does not follow that this statutory grant, if it be considered as a grant at all, can be construed as comprising a covenant "that after a reasonable time the Indian title" should be extinguished, or that the lands should become public lands so far as necessary to effectuate the grant. The proposition of learned counsel that the granting act contains implied covenants of any such character is a mistake. The government did not disable itself by the grant from keeping the occupants and their descendants on the land at will. The treaties provided that the United States could do that very thing. Congress did not intend, and by the terms of the granting act did not surrender the constitutional power of the government to maintain the occupancy of

those in possession. With notice of contemporaneous action providing for such dealing with the land as made it a matter of doubt whether the statutory grant could ever be effectuated, it is but fair to say that the railroad was neither misled nor deceived; that the railroad interest knew that the claim of the road was too remote and uncertain for purposes of credit at any time, and that the road would be built, and was expected to be built, by the aid of its grants of land elsewhere. It is reasonable to assume, considering the situation and the conditions imposed, that the agents of the company took chances as to the ultimate action of the government.

After everything is said relating to this grant, with its attendant conditions, we come back to the jurisdictional phase of the matter, because the legislation of Congress providing for perpetual Indian uses of the lands renews the question of the power of the court to proceed. Especially is there presented the right of the Court to proceed because of the act approved April 26, 1906, 34 Stat. 137.

Section 27 of that act provides that the lands belonging to the four tribes shall not become public lands, but shall be held in trust by the United States for the use and benefit of the members. All acts inconsistent with this section being expressly repealed, can it be said that the claim is justiciable?

There is no middle ground to take as between the contention of learned counsel for the railroad that the allotment proceedings beginning with the creation of the Dawes Commission and closing with the act last mentioned (including several intermediate acts) are acts of outright repudiation or are statutes which Congress had the power to enact and the President to approve.

Congress may not break the contracts of the government where rights have become vested. On the other hand, the discharge of political duties entrusted by the Constitution to the political departments of the government cannot be the proper subject of complaint by an appeal to the courts.

Underlying all the subsequent legislation leading up to the act last mentioned (which in itself is a legislative construction of direct application in the dispute relating to the nature of the grant in this cause) are treaties between this government as the sovereign and the four nations of red men. While the construction of treaties is the province of the judiciary, and certain rights under treaties cannot be affected by legislation, cases arising under treaties of a purely political character may be the subject of legislative action. In *Reichart* v. *Felps*, 6 Wall. 160, it was held that patents of the United States for land which it had previously granted, reserved from sale, or appropriated are void. At the time of this grant the plenary power of the legislative body was ample to determine that patents other than those being confirmed for Indian uses might issue and that such patents should not be void. The law-making authority could arbitrarily at that time have exercised the legislative prerogative of granting the full title to this railroad with no conditions of any kind annexed. Congress, however, did not choose to pursue this course, but gave the people in possession to understand by contemporaneous treaty agreement that their possession would never be disturbed except by consent. In *Jones* v. *Meehan*, 175 U. S. 1, where a reservation neither identified nor surveyed, but provided to be located in the future, it was held by the court to have been converted into reserve sections of individual property by treaty. In the case before the court the same

conditions were contemplated from the outset.

The history of the government's dealings with the property in controversy shows that these lands were reserved from the beginning from the public lands which were to be sold, and that from the time the occupants were put upon these reservations it was never intended that any part of that country should be sold as public lands. The lands were patented to organize civil tribal governments created by direction of Congress pursuant to a great public policy for the benefit of the coming generations of individuals of a class. The patents rested on treaties made with tribal governments as agencies for the individuals in interest. In every treaty and by repeated declaration of intention the government committed itself to the policy of maintaining and protecting the full membership in their possession. Property of these tribes was withdrawn from the operation of state laws. It was not the subject of taxation so long as tribal organization continued to be recognized by the political department. *The Kansas Indians*, 5 Wall. 737. When the treaty-making system with domestic Indians was abandoned in 1871 Congress provided (sec. 2079, Revised Statutes) that "no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired."

As with treaties made with foreign nations, *Chinese Exclusion case*, 130 U. S. 600, the legislative power has the right to pass laws in conflict with treaties made with the Indians. *Lone Wolf* v. *Hitchcock*, 187 U. S. 533. But as said in *Stephens* v. *Cherokee Nation*, 174 U. S. 483, and in *Choctaw Nation* v. *United States*, 119 U. S. 27, the action of Congress complained of there was but an exercise of the full administrative power possessed by Congress over Indian tribal property, "the property of those who * * * were in substantial effect

the wards of the government. As Congress possessed full power in the matter the judiciary cannot question or inquire into the motives which prompted the enactment of the legislation. If injury was occasioned, which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought by an appeal to that body for redress and not for the courts."

And in the case of *Cherokee Nation* v. *Hitchcock*, *supra*, the court quoted from a Senate document to the effect that "the title to these lands is held by the tribe in trust for the people."

As the plenary authority over the occupants of these lands has always been deemed a political power not subject to be controlled by the judicial department of the government, the claim of this railroad, as I see it, is not within the power of the court to aid. Its right never vested sufficiently for the courts to say that Congress did not reserve the power of control enough to make the grant effective without the consent of the occupants or to carry out the promises of the treaties without the consent of the railroad because there were no covenants expressed or implied to either extinguish the Indian title or to open the lands to the public except for Indian uses.

The action of Congress carrying out the treaties of the government with the occupants of these lands was in no sense the repudiation of an implied promise to the railroad, because no promise could be implied against the right of the government to deal with the manner, time, and conditions of extinguishing the titles outstanding at the time of the grant. These were matters exclusively for the consideration of the government and can not be interfered with nor put in contest

by private parties. *Buttz* v. *Northern Pacific Railroad*, 119 U. S. 55.

This court is without authority to entertain jurisdiction on the demand of plaintiff for a money judgment for the want of covenants carrying an express promise, or, by necessary implication, an implied promise to pay. There is no more jurisdiction in this court to entertain such a proceeding than there is in the courts where the lands are situate to maintain ejectment proceedings against the occupants for the possession of the lands.

CHEROKEE PATENT.

The United States of America.

To All to Whom These Presents Shall Come—

GREETING:

Whereas, by certain treaties made by the United States of America with the Cherokee Nation of Indians of the sixth of May, one thousand eight hundred and twenty-eight; the fourteenth of February, one thousand eight hundred and thirty-three, and the twenty-ninth of December, one thousand eight hundred and thirty-five, it was stipulated and agreed on the part of the United States, that in consideration of the promises mentioned in the said treaties, respectively, the United States should *guaranty, secure and convey by patent* to the said Cherokee Nation certain tracts of land; the description of which tracts, and the terms and conditions on which they were to be conveyed, are set forth in the second and third articles of the treaty of the twenty-ninth of December, one thousand eight hundred and thirty-five, in the words following, that is to say:

"ARTICLE 2. Whereas, by the treaty of May sixth, one thousand eight hundred and twenty-eight, and the supplementary treaty thereto of February fourteenth, one thousand eight hundred and thirty three, with the Cherokees west of the Mississippi, the United States *guaranteed and secured, to be conveyed by patent* to the Cherokee Nation of Indians the following tract of country: Beginning at a point on the old western territorial line of Arkansas territory, being twenty-five miles north from the point where the territorial line crosses Arkansas River, thence running from said north point south on the said territorial line, where the said territorial line crosses Verdigris River; thence

down said Virdigris River to the Arkansas River; thence down said Arkansas to a point where a stone is placed opposite the east or lower bank of Grand River, at its junction with the Arkansas; thence running south forty-four degrees west one mile; thence, in a straight line, to a point four miles northerly from the mouth of the north fork of the Canadian; thence along the said four-mile line to the Canadian; thence down the Canadian to the Arkansas; thence down the Arkansas to that point on the Arkansas where the eastern Choctaw boundary strikes said river, and running thence with the western line of Arkansas territory, as now defined, to the southwest corner of Missouri; thence along the western Missouri line to the land assigned the Senacas; thence on the south line of the Senecas to Grand River; thence up said Grand River, as far as the south line of the Osages extended, if necessary; thence up and between said south Osage line, extended west if necessary, and a line drawn due west from the point of beginning to a certain distance west, at which a line running north and south from Osage line to said due west line, will make seven millions of acres within the whole described boundaries. In addition to the seven millions of acres of land thus provided for and bounded, the United States *further guaranty* to the Cherokee Nation a *perpetual outlet west* and a free and unmolested use of all the country west of the western boundary of said seven millions of acres, as far west as the sovereignty of the United States and their right of soil extend: *Provided*, however, that if the Saline or Salt Plain on the western prairie shall fall within said limits prescribed for said outlet, the right is reserved to the United States to permit other tribes of red men to get salt on said plain, in common with the Cherokees, and *letters pat-*

ent shall be issued by the United States as soon as practicable for the land *hereby guaranteed*. And whereas, it is apprehended by the Cherokees that in the above cession there is not contained a sufficient quantity of land for the accommodation of the whole nation, on their removal west of the Mississippi, the United States, in consideration of the sum of *five hundred thousand dollars* therefore, hereby covenant and agree to *convey to the said Indians and their descendants, by patent, in fee-simple, the following additional tract of land*, situated between the west line of the State of Missouri and the Osage reservation, beginning at the southeast corner of the same, and runs north along the east line of the Osage lands fifty miles, to the northeast corner thereof; and thence east to the west line of the State of Missouri; thence with said line south, fifty miles; thence west to the place of beginning; estimated to contain *eight hundred thousand acres of land;* but it is expressly understood that if any of the lands assigned the Quapaws shall fall within the aforesaid bounds, the same shall be reserved and excepted out of the lands above granted, and a *pro rata* reduction shall be made in the price to be allowed to the United States for the same by the Cherokees.

ARTICLE 3. The United States also agree that the lands above ceded by the treaty of February fourteenth, one thousand eight hundred and thirty-three, including the outlet, and those ceded by this treaty, shall all be included in one patent, executed to the Cherokee Nation of Indians by the President of the United States, *according to the provisions of the Act of May twenty-eighth, one thousand eight hundred and thirty*. It is, however, agreed that the military reser-

vation at Fort Gibson shall be held by the United States. But should the United States abandon said post, and have no further use for the same, it shall revert to the Cherokee Nation. The United States shall always have the right to make and establish such *post* and *military roads* and *forts*, in any part of the Cherokee country, as they may deem proper for the interest and protection of the same, and the free use of as much land, timber, fuel and materials of all kinds, for the construction and support of the same, as may be necessary. *Provided*, that if the private rights of individuals are interfered with, a just compensation therefor shall be made. And whereas, the United States have caused the said tract of *seven millions of acres, together with the said perpetual outlet*, to be surveyed in one tract, the boundaries whereof are as follows: Beginning at a mound of rocks four feet square at base, and four and a half feet high, from which another mound of rocks bears south one chain, and another mound of rocks bears west one chain on what has been denominated the old western territorial line of Arkansas territory twenty-five miles north of Arkansas River; thence south twenty-one miles and twenty-eight chains to a post on the northeast bank of the Virdigris River, from which a hackberry, fifteen inches diameter, bears south sixty-one degrees thirty-one minutes east, forty-three links, marked C. H. L., and a cottonwood forty-two inches diameter bears south twenty-one degrees fifteen minutes east, fifty links, marked C. R. K. L.; thence down the Virdigris River, on the northeast bank, with its meanders to the junction of the Virdigris and Arkansas Rivers; thence from the lower bank of the Virdigris River on the north bank of Arkansas River south forty-four

degrees, thirteen minutes, east, fifty-seven chains, to a post on the south bank of Arkansas, opposite the eastern bank of Neosho River, at its junction with Arkansas, from which a red oak thirty-six inches diameter, bears south seventy-five degrees forty-five minutes west, twenty-four links, and a hickory, twenty-four inches diameter, bears south eighty-nine degrees east four links; thence south fifty-three degrees west, one mile to a post from which a rock bears north fifty-three degrees east, fifty links, and a rock bears south eighteen degrees, eighteen minutes west, fifty links; thence south eighteen degrees, eighteen minutes west thirty-three miles twenty-eight chains and eighty links, to a rock from which another rock bears north eighteen degrees eighteen minutes east fifty links, and another rock bears south fifty links; thence south four miles to a post on the lower bank of the north fork of Canadian River, at its junction with Canadian River, from which a cottonwood, twenty-four inches diameter, bears north eighteen degrees east, forty links, and a cottonwood, fifteen inches diameter, bears south nine degrees east fourteen links; thence down the Canadian River on its north bank of its junction with Arkansas River; thence down the main channel of Arkansas River to the western boundary of the State of Arkansas, at the northern extremity of the eastern boundary of the lands of the Choctaws, on the south bank of Arkansas River, four chains and fifty-four links, east of Fort Smith; thence north seven degrees, twenty-five minutes west, with the western boundary of the State of Arkansas, seventy-six miles, sixty-four chains and fifty links, to the southwest corner of the State of Missouri; thence north on the eastern boundary of the State of Missouri, eight miles, forty-nine chains and

fifty links, to the north bank of Cowskin, or Seneca River, at a mound six feet square at base, and five feet high, in which is a post marked on the south side Cor. n. Ch. Ld.; thence west on the southern boundary of the lands of the Senecas, eleven miles and forty-eight chains, to a post on the east bank of Neosho River, from which a maple, eighteen inches diameter, bears south thirty-one degrees east, seventy-two links; thence up Neosho River, with its meanders, on the east bank, to the southern boundary of Osage lands, thirty-six chains and fifty links, west of the southeast corner of the lands of the Osages, witnessed by a mound of rocks on the west bank of Neosho River; thence west on the southern boundary of the Osage lands, to the line dividing the territory of the United States from that of Mexico, two hundred and eighty-eight miles, thirteen chains and sixty-six links, to a mound of earth, six feet square at base, and five and a half feet high in which is deposited a cylinder of charcoal, twelve inches long and four inches diameter; thence south along the line of the territory of the United States and of Mexico, sixty miles and twelve chains, to a mound of earth six feet square at base and five and a half feet high, in which is deposited cylinder of charcoal, eighteen inches long and three inches diameter; thence east, along the northern boundary of Creek lands, two hundred and seventy-three miles, fifty-five chains and sixty-six links, to the beginning; containing within the survey *thirteen millions five hundred and seventy-four thousand one hundred and thirty-five acres and fourteen hundredths of an acre.*

And whereas, the United States have also caused the said tract of *eight hundred thousand acres* to be surveyed, and have ascertained the boundaries thereof to be as follows:

Beginning at southeast corner of Osage lands, described by a rock, from which a red oak twenty inches diameter bears south twenty-seven degrees east, seventy-six links, and a burr oak, thirty inches diameter, bears south fifty-nine degrees west one chain; and another burr oak, thirty inches diameter, bears north eight degrees west, one chain and thirty-seven links; and another burr oak forty inches diameter bears north thirty degrees west, one chain and eighty-one links and running east twenty-five miles to a rock on the western line of the State of Missouri, from which a post oak ten inches diameter bears north forty-eight degrees, thirty minutes, east, four chains; and a post oak twelve inches diameter bears south sixty-two degrees east, five chains; thence north, with the western boundary of the State of Missouri, fifty miles, to a mound of earth, five feet square at base and four and a half feet high; thence west twenty-five miles to the northeast corner of the lands of the Osages, described by a mound of earth six feet square at base and five feet high; thence south along the eastern boundary of Osage lands, fifty miles, to the beginning, containing eight hundred thousand acres."

THEREFORE, in execution of the agreements and stipulations contained in the said several treaties, the United States have *given* and *granted*, and by these presents do *give* and *grant*, unto the said Cherokee Nation, the two tracts of land, so surveyed and hereinbefore described, containing in the whole *fourteen millions three hundred and seventy four thousand one hundred and thirty five acres, and fourteen hundredths of an acre, to have and to hold the same*, together with all the rights, privileges and appurtenances thereto belonging to the said *Cherokee Nation forever*; subject,

however, to the right of the United States to permit other tribes of red men to get salt on the salt plain on the western prairie referred to in the second article of the treaty of the twenty-ninth of December, one thousand eight hundred and thirty-five, which salt plain has been ascertained to be within the limits prescribed for the outlet agreed to be granted by said article; and subject, also, to all the other rights reserved to the United States, in and by the articles hereinbefore recited, to the extent and in the manner in which the said rights are so reserved; *and subject also to the condition provided by the act of Congress of the twenty-eighth of May, one thousand eight hundred and thirty, referred to in the above-recited third article, and which condition is, that the lands hereby granted shall revert to the United States if the said Cherokee Nation becomes extinct, or abandons the same.*

In testimony whereof, I, Martin Van Buren, President of the United States of America, have caused these letters to be made *patent*, and the *Seal* of the *General Land Office* to be hereunto affixed.

Given under my hand, at the *City of Washington*, the thirty-first day of December, in the year of our Lord one thousand eight hundred and thirty-eight, and of the Independence of the United States, the sixty third.

(SEAL) *By the President*, M. VAN BUREN.

(Signed) H. M. GARLAND,

Recorder of the General Land Office.

CREEK OR MUSKOGEE PATENT.

The United States of America.

To All Who Shall See These Presents—GREETING:

WHEREAS, A treaty was made and concluded on the fourteenth day of February, in the year of our Lord eighteen hundred and thirty three, in the words following, to wit:

"ARTICLE 2. The United States hereby agree with the consent of the Creek and Cherokee Delegates, this day obtained, that the Muskogee or Creek country west of the Mississippi shall be embraced within the following boundaries, viz: Beginning at the mouth of the north fork of the Canadian River and run northerly four miles; thence running a straight line so as to meet a line drawn from the south bank of the Arkansas River opposite to the east or lower bank of the Grand River at its junction with the Arkansas, and which runs a course south 44 degrees west one mile, to a post placed in the ground; thence along said line to the Arkansas, and up the same and the Verdigris River to where the old territorial line crosses it; thence along said line north to a point twenty five miles from the Arkansas River where the old territorial line crosses the same; thence running at right angles with the territorial line aforesaid, or west, to the Mexico line; thence along the said line southerly to the Canadian River; or to the boundary of the Choctaw country; thence down said river to the place of beginning.

The lines hereby defining the country of the Muskogee Indians on the north and east, bound the country of the Cherokees along these courses as settled by the treaty concluded this day between the United States and that tribe.

ARTICLE 3. The United States will grant a *patent in*

fee-simple to the Creek Nation for the land assigned said nation by this treaty or convention, whenever the same shall have been ratified by the President and Senate of the United States; *and the right thus granted by the United States shall be continued to said tribe of Indians so long as they shall exist as a nation and continue to occupy the country hereby assigned them.*

ARTICLE 4. It is hereby mutually understood and agreed between the parties to this treaty that the *land assigned to* the Muskogee Indians by the second article thereof, *shall be taken and considered as the property of the whole Muskogee or Creek Nation*, as well as those now residing upon the land as of the great body of said nation who still remain on the east side of the Mississippi; and it is also understood and agreed that the Seminole Indians of Florida, whose removal to this country is provided by their treaty with the United States dated May 9th, 1832, *shall also have a permanent and comfortable home on* the lands hereby *set apart as the country* of the Creek Nation; and they, the Seminoles, will hereafter be considered a constituent part of said nation, but are to be located on some part of the Creek country by themselves; which location will be selected for them by the commissioners who have signed these articles of agreement or convention."

NOW, KNOW YE, that the United States of America, in consideration of the premises and in conformity with the above recited provisions of the treaty aforesaid, *have given and granted, and by these presents do give and grant unto the said Muskogee or Creek tribe of Indians*, the tract of country above described. *To have and to hold the same unto the said tribe of In-*

dians so long as they shall exist as a nation and continue to occupy the country hereby assigned to them.

In Testimony Whereof, I, Millard Fillmore, President of the United States of America, have caused these letters to be made patent and the seal of the Department of the Interior to be hereto affixed.

Given under my hand at the City of Washington the eleventh day of August, in the year of our Lord one thousand eight hundred and fifty-two and of the Independence of the United States the seventy-seventh.

Millard Fillmore.

By the President.

Alexander H. H. Stuart,
Secretary Department of the Interior.

Philip H. Raiford,
United States Agent for the Creek Indians.

Engrossed from the original draft sent to this office by the Commissioner of Indian Affairs.

Bureau of the Corps of the Topographical Engineers. August 7th, 1852.

John I. Abest,
Col. Corps of Engineers.

CHOCTAW PATENT.

The United States of America.

To All to Whom These Presents Shall Come—

GREETING:

Whereas, by the second article of the treaty, began and held at Dancing Rabbit Creek, on the fifteenth day of September, in the year of our Lord one thousand eight hundred and thirty (as ratified by the Senate of the United States, on the 24th of February, 1831), by the commissioners on the part of the United States, and the Mingoes, chiefs, captains and warriors of the Choctaw Nation, on the part of said nation, it is provided that "The United States, *under a grant specially to be made* by the President of the United States, shall cause to be conveyed to the Choctaw Nation" a tract of country west of the Mississippi River, *in fee-simple, to them and their descendants, to inure to them while they shall exist as a nation, and live on it:* Beginning near Fort Smith, where the Arkansas boundary crosses the Arkansas River, running thence to the source of the Canadian fork, if in the limits of the United States, or to those limits; thence due south to Red River, and down Red River to the west boundary of the territory of Arkansas; thence north along that line to the beginning. The boundary of the same to be agreeable to the treaty made and concluded at Washington City in the year 1825.

Now, Know Ye, That the United States of America, in consideration of the premises, and in execution of the agreement and stipulation in the aforesaid treaty, have given and granted, and by these presents *do give, and grant, unto the said Choctaw Nation, the aforesaid* "Tract of country west of the Mississippi"; *to have and to hold the same, with all the rights, privileges,*

immunities, and appurtenances of whatsoever nature thereunto belonging, *as intended "to be conveyed"* by the aforesaid article, *"in fee-simple to them and their descendants, to inure to them, while they shall exist as a nation and live on it" liable to no transfer or alienation, except to the United States, or with their consent.*

In testimony whereof, I, John Tyler, President of the United States of America, have caused these letters to be made patent, and seal of the General Land Office to be hereunto affixed. Given under my hand at the City of Washington the twenty-third day of March, in the year of our Lord one thousand eight hundred and forty-two and of the Independence of the United States the sixty-sixth.

By the President: JOHN TYLER.

DAN'L WEBSTER,
Secretary of State.

JOHN C. SPENCER,
Secretary of War.

T. HARTLEY CRAWFORD,
Commissioner of Indian Affairs.

Recorded, Volume 1, page 43.

J. WILLIAMSON,
Recorder of General Land Office.

Executed in the Bureau of Typographical Engineers.

JOHN J. ALBERT,
Col. Corps T. Engineers.

Returned to the War Department for the Choctaw Nation, March 24, 1842.

E. M. HUNTINGTON,
(L. S.) *Commissioner of the General Land Office.*

I hereby certify that the foregoing and above transcript is a true and correct copy from the original patent, now on file in my office.

In witness hereto I have affixed the seal of the Choctaw Nation, this January 26th, 1886.

THOMPSON McKINNEY,
National Secretary, Choctaw Nation.

ACT OF JULY 25, 1866.

"*An Act Granting Lands to the State of Kansas to Aid in the Construction of the Kansas and Neosho Valley Railroad and its Extension to Red River.*

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That for the purpose of aiding the Kansas and Neosho Valley Railroad Company, the same being a corporation organized under the laws of the State of Kansas, to construct and operate a railroad from the eastern terminus of the Union Pacific Railroad, Eastern Division, at the line between Kansas and Missouri, at or near the mouth of the Kansas river, on the south side thereof, southwardly, through the eastern tier of counties in Kansas, with a view of its extension, so as to effect a junction at Red river with a railroad now being constructed from Galveston to Red river at or near Preston, in Texas, there is hereby granted to the State of Kansas, for the use and benefit of said Railroad Company, every alternate section of land or parts thereof, designated by odd numbers, to the extent of ten sections per mile on each side of said road, to be selected within twenty miles from (of) the line of said road; but in case it shall appear that the United States have, when the line of said road is definitely located, sold any section, or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid, from the public lands of the United States nearest to the sections above specified, so much land as shall be

equal to the amount of such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached as aforesaid, which lands, thus indicated by the direction of the Secretary of the Interior, shall be reserved and held for the State of Kansas for the use of said company by the said Secretary for the purpose of the construction and operation of said railroad, as provided by this act: *Provided*, That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby, reserved and excepted from the operation of this act, except so far as it may be found necessary to locate the route of said road through such reserved lands, in which case the right-of-way two hundred feet in width is hereby granted, subject to the approval of the President of the United States: *And provided, further*, That none of the lands hereby granted shall be selected beyond twenty miles from the said road.

"SEC. 2. *And be it further enacted*, That the sections and parts of sections of land which by the aforesaid grant shall remain in the United States, within ten miles on each side of said road, shall not be sold for less than double the minimum price of public lands when sold, nor shall any of said lands become subject to sale at private entry until the same shall have been first offered at public sale to the highest bidder, at or above the minimum price aforesaid: *Provided*, That actual *bona fide* settlers under the pre-emption laws of the United States may, after due proof of settlement, improvement, and occupation, as now pro-

vided by law, purchase the same at the price fixed for said lands at the date of such settlement, improvement, and occupation: *And provided, also*, That settlers under the provisions of the homestead act, who make their settlement after the passage of this act, and comply with the terms, and requirements of said act, shall be entitled, within the said limits of ten miles, to patents for an amount not exceeding eighty acres each.

"SEC. 3. *And be it further enacted*, That the grant of lands hereby made is upon condition that said company, after the construction of its road, shall keep it in repair and use and that (it will) at all times be in readiness to transport troops, munitions of war, supplies and public stores upon its road for the Government, when required to do so by any department thereof, at the cost, charge, and expense of said company. And the lands hereby granted, held and reserved as aforesaid shall inure to the benefit of said company, as follows: When the Governor of the State of Kansas shall certify that any section of ten consecutive miles of said road is completed in a good, substantial, and workmanlike manner as a first-class railroad, then the said Secretary of the Interior shall issue to the said company patents for so many sections of the lands within the limits above named as are coterminous with said completed section herein before granted; and when certificates of the Governor aforesaid shall be presented to said Secretary, of the completion, as aforesaid, of each successive section of ten consecutive miles of said road, the said Secretary shall in like manner issue to said company patents for the land for each of said sections of road as in the first instance, until said road shall be completed;

Provided, That, if said road is not completed within ten years from the date of the acceptance of the grant hereinbefore made, the lands remaining unpatented shall revert to the United States: *And provided further*, That the said lands shall not, in any manner, be disposed of or incumbered by said company or its assigns, except as the same are patented under the provisions of this act.

"SEC. 4. *And be it further enacted*, That as soon as said company shall file with the Secretary of the Interior maps of its line, designating the route thereof, it shall be the duty of the said Secretary to withdraw from the market the lands granted by this act, in such manner as may be best calculated to effect the purposes of this act and subserve the public interest.

"SEC. 5. *And be it further enacted*, That the United States mail shall be transported on said road and its extension, under the direction of the Post-Office Department, at such price as Congress may by law provide: *Provided*, That until such price is fixed by law, the Postmaster General shall have power to fix the compensation.

"SEC. 6. *And be it further enacted*, That the right-of-way through the public lands be, and the same is hereby, granted to the said Kansas and Neosho Valley Railroad Company, its successors and assigns, for the construction of a railroad as proposed; and the right is hereby given to said corporation to take from the public lands adjacent to the line of said road material for the construction thereof. Said way is granted to said railroad to the extent of one hundred feet in width on each side of said road, where it may pass through the public domain; also all necessary

ground for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables and water stations.

"SEC. 7. *And be it further enacted*, That the acceptance of the terms, conditions, and impositions of this act by the said Kansas and Neosho Valley Railroad Company shall be signified in writing, under the corporate seal of the said company, duly executed pursuant to the direction of its board of directors first had and obtained, which acceptance shall be made within one year after the passage of this act, and not afterwards, and shall be deposited with the Secretary of the Interior.

"SEC. 8. *And be it further enacted*, That said Kansas and Neosho Valley Railroad Company, its successors and assigns, is hereby authorized and empowered to extend and construct its railroad from the southern boundary of Kansas south, through the Indian Territory, to Red river, at or near Preston, in the State of Texas, so as to connect with the railway now being constructed from Galveston to a point at or near Preston, in said State, and the right-of-way through the Indian Territory, wherever such right is now reserved or may hereafter be reserved to the United States by treaty with the Indian tribes, is hereby granted to said company, to the same extent as granted by the sixth section of this act, through the public lands; and in all cases where the right-of-way, as aforesaid, through the Indian lands shall not be reserved to the Government, the said company shall, before constructing its road, procure the consent of the tribe or tribes interested, which consent, with all its terms and conditions, shall be previously

approved and endorsed by the President and filed with the Secretary of the Interior.

"SEC. 9. *And be it further enacted*, That the same grants of lands through the Indian Territory are hereby made as provided in the first section of this act, whenever the Indian title shall be extinguished by treaty or otherwise, not to exceed the ratio per mile granted in the first section of this act: *Provided*, That said lands become a part of the public lands of the United States.

"SEC. 10. *And be it further enacted*, That said Kansas and Neosho Valley Railroad Company, its successors and assigns, shall have the right to negotiate with, and acquire from any Indian nation or tribe, authorized by the United States to dispose of lands for railroad purposes, and from any other nation or tribe of Indians through whose lands said railroad may pass, subject to the approval of the President of the United States, or from any company or parties incorporated or authorized for such purposes, by such nation or tribe, or which such parties may have acquired under the laws of the United States.

"SEC. 11. *And be it further enacted*, That any railroad company chartered under any law of the United States, or of the State of Kansas, which may have been heretofore or shall hereafter be recognized and subsidized by any act of the Congress of the United States, may connect, unite, and consolidate with this railroad company, after the same shall be located to the valley of the Neosho river, upon just, fair, and equitable terms, to be agreed upon between the parties, and shall not be against the public interest or the interest of the United States; nor shall any road

authorized to connect as aforesaid charge the road so connecting a greater tariff per mile for freight or passengers than is charged for the same per mile by its own road: *And provided further*, That should the Leavenworth, Lawrence and Fort Gibson Railroad Company, or the Union Pacific Railroad Company, Southern Branch, construct and complete its road to that point on the southern boundary of the State of Kansas where the lines of said Kansas and Neosho Valley Railroad shall cross the same, before the said Kansas and Neosho Valley Railroad Company shall have constructed and completed its said road to said point, then and in that event the company so first reaching in completion the said point on the southern boundary of the State of Kansas shall be authorized, upon obobtaining the written approval of the President of the United States, to construct and operate its line of railroad from said point to a point at or near Preston, in the State of Texas, with grants of land according to the provisions of this act, but upon the further special condition, nevertheless, that said railroad company shall have commenced in good faith the construction thereof before the said Kansas and Neosho Valley Railroad Company shall have completed its said railroad to said point: *And provided further*, That said other railroad company, so having commenced said work in good faith, shall continue to prosecute the same with sufficient energy to insure the completion of the same within a reasonable time, subject to the approval of the President of the United States: *And provided further*, That the right-of-way through private property, when not otherwise provided for in this act, or by the law of any State through which the

road may pass, shall be obtained by said Kansas and Neosho Valley Railroad Company, or either of the other companies named in this act, in accordance with the provisions of section three of an act to amend an act, entitled 'An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the Government the use of the same for postal, military and other purposes,' approved July first, eighteen hundred and sixty-two" (14 U. S. Sts. 236).

ACT OF JULY 26, 1866.

"*An Act Granting Lands to the State of Kansas to Aid in the Construction of a Southern Branch of the Union Pacific Railway and Telegraph from Fort Riley, Kansas, to Fort Smith, Arkansas.*

"*Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled*, That for the purpose of aiding the Union Pacific Railroad Company, Southern Branch, the same being a corporation organized under the laws of the State of Kansas to construct and operate a railroad from Fort Riley, Kansas, or near said military reservation, thence down the valley of the Neosho river to the southern line of the State of Kansas, with a view to an extension of the same through a portion of the Indian Territory to Fort Smith, Arkansas, there is hereby granted to the State of Kansas, for the use and benefit of said railroad company every alternate section of land or parts thereof designated by odd numbers, to the extent of five alternate sections per mile on each side of said road, and not exceeding in all ten sections per mile: but, in case it shall appear that the United States have, when the line of said road is definitely located, sold any section, or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid, from the public lands of the United States nearest to the sections above specified, so much land as shall be equal to the amount of such lands as the United States have

sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached as aforesaid, which lands, thus indicated by the direction of the Secretary of the Interior, shall be reserved and held for the State of Kansas for the use of said company by the said Secretary, for the purpose of the construction and operation of said railroad, as provided by this act: *Provided*, That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby, reserved and excepted from the operation of this act, except so far as it may be found necessary to locate the route of said road through such reserved lands, in which case the right-of-way, two hundred feet in width, is hereby granted, subject to the approval of the President of the United States: *And provided further*, That said lands hereby granted shall not be selected beyond twenty miles from the line of said road.

"SEC. 2. *And be it further enacted*, That the sections and parts of sections of land which by the aforesaid grant shall remain in the United States, within ten miles on each side of said road, shall not be sold for less than double the minimum price of public lands when sold: *Provided*, That actual *bona fide* settlers under the pre-emption laws of the United States may, after due proof of settlement, improvement, and occupation, as now provided by law, purchase the same at the price fixed for said lands at the date of such settlement, improvement, and occupation: *Provided, also*, That settlers under the provisions of the home-

stead act, who make their settlement after the passage of this act and comply with the terms and requirements of said act, shall be entitled, within the said limits of ten miles, to patents for an amount not exceeding eighty acres each.

"SEC. 3. *And be it further enacted*, That the grant of lands hereby made is upon condition that said company, after the construction of its road, shall keep it in repair and use, and shall at all times transport troops, munitions of war, supplies, and public stores upon its road for the Government of the United States, free from all cost or charge therefor to the Government, when required to do so by any department thereof. And the lands hereby granted shall inure to the benefit of said company, as follows: When the Governor of the State of Kansas shall certify that any section of ten consecutive miles of said road is completed in a good, substantial, and workmanlike manner, as a first-class railroad, then the said Secretary of the Interior shall issue to the said company patents for so many sections of the land herein granted within the limits above named, and coterminous with said completed section hereinbefore granted; and when certificates of the Governor aforesaid shall be presented to said Secretary of the completion, as aforesaid, of each successive section of ten consecutive miles of said road, the said Secretary shall in like manner issue to said company patents for the land for each of said sections of road as in the first instance, until said road shall be completed: *Provided*, That if said road is not completed within ten years from the date of the acceptance of the grant hereinbefore made, the lands remaining unpatented shall revert to the United States.

"SEC. 4. *And be it further enacted*, That as soon as said company shall file with the Secretary of the Interior, maps of its line, designating the route thereof, it shall be the duty of said Secretary to withdraw from the market the lands granted by this act, in such manner as may be best calculated to effect the purposes of this act and subserve the public interest.

"SEC. 5. *And be it further enacted*, That the United States mail shall be transported on said road, and under the direction of the Post-Office Department, at such price as Congress may by law provide: *Provided*, That until such price is fixed by law the Postmaster General shall have power to fix the compensation.

"SEC. 6. *And be it further enacted*, That the right of way through the public lands be, and the same is hereby, granted to said Pacific Railroad Company, Southern Branch, its successors and assigns, for the construction of a railroad as proposed; and the right is hereby given to said corporation to take from the public lands adjacent to the line of said road material for the construction thereof. Said way is granted to said railroad to the extent of one hundred feet in width on each side of said road where it may pass through the public domain; also all necessary ground for station buildings, work-shops, depots, machine shops, switches, side tracks, turntables and water stations.

"SEC. 7. *And be it further enacted*, That the acceptance of the terms, conditions and impositions of this act by the said Pacific Railroad Company, Southern Branch, shall be signified in writing, under the corporate seal of the said company, duly executed pursuant to the direction of its board of directors first had and obtained, which acceptance shall be made within one year after the passage of this act, and not

afterwards, and shall be deposited with the Secretary of the Interior.

"SEC. 8. *And be it further enacted*, That said Pacific Railroad Company, Southern Branch, its successors and assigns, is hereby authorized and empowered to extend and construct its railroad from the southern boundary of Kansas, south through the Indian Territory, with the consent of the Indians, and not otherwise, along the valley of Grand and Arkansas rivers, to Fort Smith, in the State of Arkansas; and the right-of-way through said Indian Territory is hereby granted to said company, its successors and assigns, to the extent of one hundred feet on each side of said road or roads, and all necessary ground for stations, buildings, workshops, machine shops, switches, side tracks, turntables and water stations.

"SEC. 9. *And be it further enacted*, That the same grant(s) of lands through said Indian Territory are hereby made as provided in the first section of this act, whenever the Indian title shall be extinguished by treaty or otherwise, not to exceed the ratio per mile granted in the first section of this act: *Provided*, That said lands become a part of the public lands of the United States.

"SEC. 10. *And be it further enacted*, That said Pacific Railroad Company, Southern Branch, its successors and assigns, shall have the right to negotiate with, and acquire title to land for railroad purposes from, any Indian nation or tribe authorized by the United States to dispose of lands, and from any other nation or tribe of Indians through whose lands said railroad may pass, subject to the approval of the United States, or from any company or parties incorporated or authorized for such purposes, by such nation or tribe, or

which such parties may have acquired under the laws of the United States.

"SEC. 11. *And be it further enacted*, That any railroad company chartered under any law of the United States, or of any State which may have been heretofore or shall hereafter be organized by any act of Congress of the United States, may connect, unite, and consolidate with this railroad company, after the same shall be located to the valley of the Neosho or Grand river, upon just, fair, and equitable terms, to be agreed upon between the parties, as shall not be against the public interest, or the interest of the United States" (14 U. S. Sts. 289).

Supreme Court,
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JAMES D. MAHE
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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1914.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY, *Appellant,*

vs.

THE UNITED STATES, *Respondent.*

No. 25.

REPLY BRIEF FOR APPELLANT.

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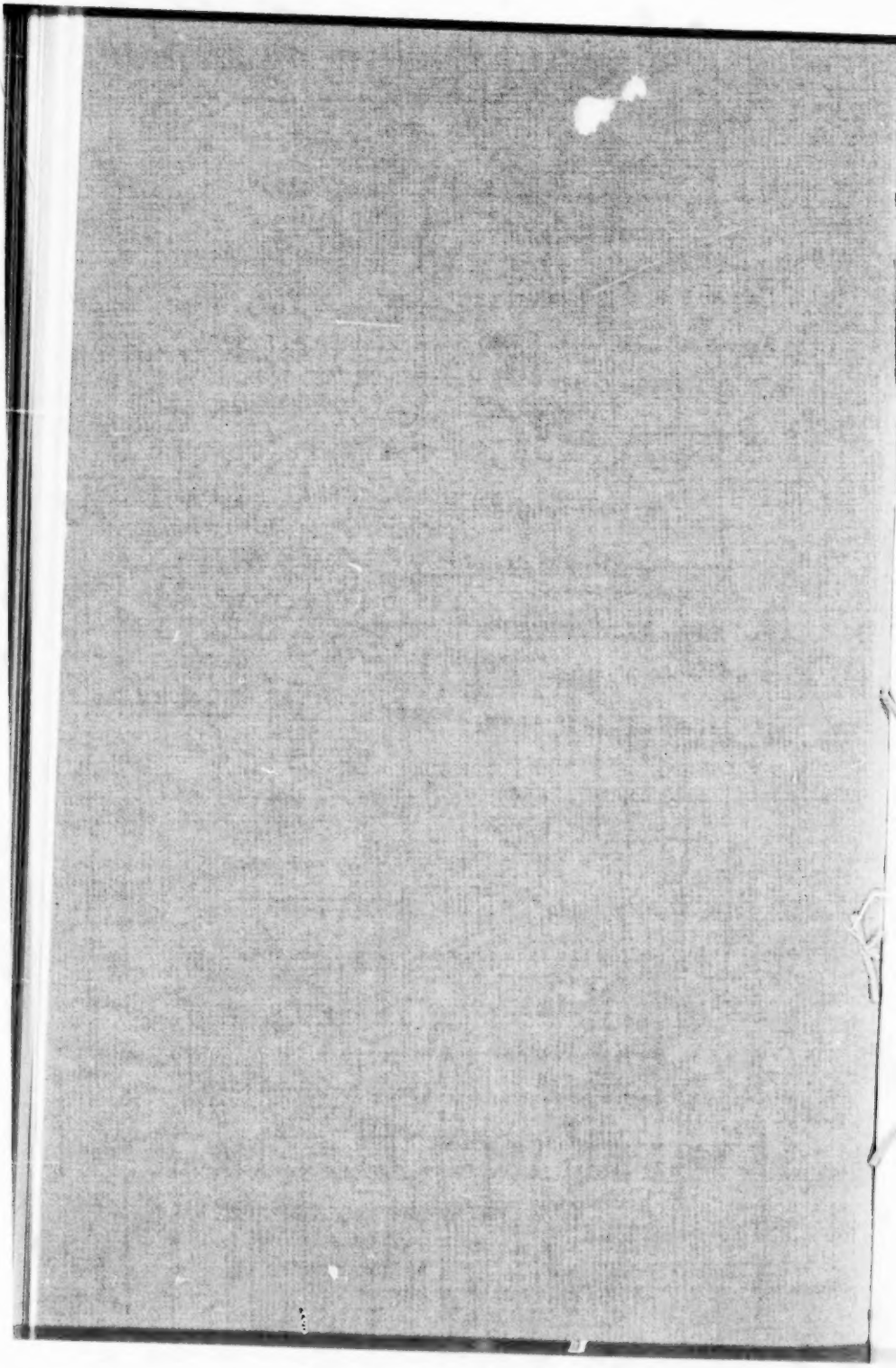

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OCTOBER TERM, 1914.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY,
Appellant,

vs.

THE UNITED STATES,
Respondent.

No. 25.

REPLY BRIEF FOR APPELLANT.

Counsel for Government concede practically every contention we have made throughout this litigation (Government Brief, pp. 5 6), except they claim there was not a grant of the lands in praesenti, and hence the railway company never acquired such a vested property interest in the lands as the United States could not take away or destroy without responding in damages.

There is no merit in the contention of the Government, now for the first time put forward, that there could not be a grant *in praesenti*, because there was

then no ascertained grantee. The basis for this contention is solely that the grant was to be given to the road first constructing to the southern boundary of the State of Kansas, and that until that event occurred, it could not be known which of the three companies named would become the grantee, and in support thereof the case of Hall v. Russell, 101 U. S. 503, is referred to.

This contention is fully disposed of in the case of Jamestown & Northern R. R. Co. v. Jones, 177 U. S. 131, wherein the Court had under consideration the general right-of-way Act of March 3, 1875, 18 Stats. 482. In that case the Court said, page 130:

> "There is some uncertainty in the Act. Its first section is expressed in words of present grant, but there is no definite grantee. We said in Hill v. Russell, 101 U. S. 503, 509: 'There cannot be a grant unless there is a grantee, and consequently there cannot be a present grant unless there is a present grantee.' And it was further said that in all cases where a grant was given a present effect, a State or some other corporation having all of the qualifications specified in the Act had been designated as a grantee. In other words, when an immediate grant was intended an immediate grantee having all the requisite qualifications was named. In Noble v. Railroad Co., 147 U. S. 165, we said: 'The language of that section is "that the right-of-way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory," etc. The uniform rule of this Court has been that such an act was a grant *in praesenti* of lands to be thereafter identified. Railway Co. v. Alling, 99 U. S. 463.'
>
> "This case establishes that a railroad company

> becomes specifically a grantee by filing its articles of incorporation and due proofs of its organization under the same with the Secretary of the Interior. It was also so held by Mr. Secretary Vilas in Dakota Central R. R. Co. v. Downey, 8 Land Divisions 115."

In our case the grant made by the first and ninth sections of the Act is in words of present grant under a long and unbroken line of cases decided by this Court (our Original Brief, pp. 167-176). Under the 11th section the grantee was to be one of three specifically named railroad companies which was to be determined in a given manner just as the grantee under the general Right of Way Act was to be determined by filing proof of incorporation with the Secretary of the Interior. It will be seen, therefore, that the point relied upon by the Government has been specifically considered by this Court and determined against the contention of the Government.

To the same effect as Jamestown & N. R. R. v. Jones, *supra*, is

> Pennsylvania M. & Imp. Co. v. Everett St. R. R., 69 Pac. Rep. 628.

In Missouri, Kansas & Texas Ry. Co. v. Kansas Pacific Ry. Co., 97 U. S. 491, this Court said:

> "It is always to be borne in mind, in construing a congressional grant, that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it **as will carry out the intent of Congress. That intent should not be defeated by applying to the grant the rules of the common law**, which are properly applicable only to transfers between private parties. To the validity of such transfers it may be admitted that

> there must exist a present power of identification of the land; and that where no such power exists, instruments, with words of present grant, are operative, if at all, only as contracts to convey. **But the rules of the common law must yield in this, as in all other cases, to the legislative will.**"

As shown by the petition, claimant company was incorporated September 25, 1865 long prior to the date of the grant.

The case of Hall v. Russell is in no sense an authority against us. On the contrary, the case decides that a settler under a donation act, after completing a four years residence upon the land, became an identified grantee and took the title. The Court said:

> "Coming then to the present case, we find that the grantee designated was any qualified 'settler or occupant of the public lands * * * who shall have resided upon or cultivated the same for four consecutive years, and shall otherwise conform to the provisions of the act.' The grant was not to a settler only, but to a settler who had completed the four years of residence, etc., and had otherwise conformed to the act. Whenever a settler qualified himself to become a grantee, he took the grant and his right to a transfer of the legal title from the United States became vested."

In the case at bar the claimant railway company was in existence at the date of the grant and became entitled to the grant under Section 11 of the act, by first completing its line of railroad to the northern boundary line of the Indian Territory. The claimant railway company by name was expressly designated in the act.

If there is any room for doubt about the foregoing proposition, then there can be no doubt upon this fur-

ther proposition that there was a present grant by limitation of the lands in the Indian Territory to the Kansas & Neosho Valley Railroad Company, the specially named grantee, then in existence, under and by virtue of the terms of Sections 1 and 9 of the Act, and a grant *in praesenti* upon conditional limitation over to the Missouri, Kansas & Texas Railway Company, then in existence, if it should first construct its line of railroad to the northern boundary of the Indian Territory, as prescribed by Section 11 of the Act. If the Kansas & Neosho Valley Company had first constructed its line of railroad to the northern boundary of the Indian Territory, as prescribed in Section 11, then that company would have acquired the lands in the Indian Territory by a grant *in praesenti*, but Section 11 provided that if the claimant company should first complete its line of railroad to the northern boundary of the Indian Territory, that then and thereupon the title should be divested out of the Kansas & Neosho Valley Company, and should vest *in praesenti* in the claimant company. This proposition is fully supported by all the text-books and authorities. Tiedeman on Real Property, Sec. 211, and cases cited, and our Original Brief, pp. 127 e and f and pp. 310-322.

No change was made in the titles to the lands in question either between date of the act and the completion of our line to the Indian Territory or between that date and the completion of our line through the Indian Territory. We did everything we were required to do, and counsel so concede.

The grant in question constituted a **contract, executed** or **executory**, between the United States and the Railway Company, whether construed as a grant of lands *in praesenti*, effective from the date of the act

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(or at least upon the location of the line) or as an offer to grant same *in futuro* upon the conditions named, effective from the date of the extinguishment of the Indian title, which is conceded. The Railway Company's case is not rested upon one or the other of the propositions, but upon both. Even though there was not a grant *in praesenti*, yet when the Railway Company accepted the offer and proposition of the Government and built the railroad within the time required and as specified in the act, doing everything that was required of it to be done (and the Government concedes that we did so) the grant then became an executed contract, and then and thereupon the Railway Company acquired a vested interest in the lands covered by the contract as well as in the contract itself, neither of which could it be deprived of without compensation. This branch of the case, and proposition of the appellant, counsel for the Government entirely overlook, although it is clearly made by the petition and is fully covered by our Original Brief, pages 185-205 and 250-257.

Counsel for the Government, at page 23 of their brief, expressly concede, that under the Act of July 25, 1866, there was a grant *in praesenti* of the lands in the State of Kansas, yet assert that there was no grant *in praesenti*, nor a grant in any other way, of the lands in the Indian Territory. The argument is made that the first seven sections of the act relate entirely to the lands in Kansas and have no reference to the Indian lands in the Indian Territory, yet hitherto throughout this litigation, counsel for the Government have strongly contended that all of the **reservations** and **conditions** in Section 1 of the act relating to the lands in the State of Kansas must be **superadded** to the **pro-**

visions in Section 9 specifically relating to the lands in the Indian Territory. The grant of the Indian lands in the Indian Territory by Section 9 is by express words **the same as the grant of the lands in the State of Kansas**, but the conditions are different, because different conditions existed with respect to the lands in Kansas and those in the Indian Territory. Section 9 expressly provides "**That the same grants of lands through the said Indian Territory are hereby made, as provided in the first section of this act.**" Section 8 not only contains a grant of the **right to construct** the railroad through the Indian Territory, but contains a **grant in praesenti of a right-of-way through the Indian Territory** "**to the same extent** as granted by the sixth section of the act to the public lands" in Kansas.

In the **Roberts Case**, cited in our original brief, this Court expressly held that the Government had not only the **power**, but the **right** to grant the fee *in praesenti*, together with the right of immediate possession as to the right of way of claimant company through the Osage Indian lands in Kansas **without the consent of the Indians.** That case involved the construction of the Act of July 26th, 1866. As to the right of way through the Indian Territory the same condition existed, except that by the Indian treaties of 1866 the Indians had given their consent to the grant of the right of way together with the right of immediate possession. Immediate possession in the grant of the right of way was necessarily implied because the Government desired the immediate construction of the railroad. So far, therefore, as the grant of the right of way through the Indian Territory was concerned, under the **Roberts Case** there was no necessity for the consent of the Indians either as to the grant of the fee or the grant

of the right of immediate possession, and as to the grant of lands through the Indian Territory, no consent of the Indians was necessary because the Government retained the fee to the lands; and while the fee to the lands was presently granted, the right of possession was to be postponed until the Indian title was extinguished, which made unnecessary any consent on the part of the Indians to the grant. No other interpretation can be placed upon Sections 8 and 9, when read together. Section 8 covers the grant of the right-of-way through the Indian Territory and gave the right of immediate possession thereto, because the Indians had already given their consent in the Indian treaties to an extinguishment of their title as to the right-of-way. They had not given their consent to the immediate extinguishment of their possessory rights in the lands granted. So, in Section 9, the fee to the lands was granted, but the right of possession was postponed until the Indian title was extinguished, when the consent of the Indians would not be necessary.

The present contention of counsel for the Government that the first seven sections of the act relate only to lands in Kansas, and Sections 8, 9, 10 and 11 entirely to lands in the Indian Territory ought to, and we think does, conclusively answer all of their previous contentions that the reservation and provisos contained in Section 1, as to the lands in the State of Kansas, must be superadded to the specific conditions and provisos in Section 9 of the grant of lands in the Indian Territory. If the Indian lands were to be wholly excepted from the terms of the grant, why were Sections 9, 10 and 11 put into the act at all? It is perfectly clear that the intention of Congress was to make a present grant of the Indian lands, subject only to the conditions named

in Section 9, and that the grant thereof was to be **the same** as of the grant of lands in the State of Kansas; namely, a grant *in praesenti*, which could not be taken away, changed or modified by subsequent acts of Congress.

This is not a suit between the railway company and the Indians, but between the railway company and the Government, and however "strictly" the act may be construed as against the railway company, no authorities are referred to, nor can any be found in the books, which justify a construction, **strict**, or otherwise, which will defeat the **plain intention** of the Congress of the United States in making the grant, and of the railway company in accepting the grant. The authorities as we have shown are all to the contrary (our Original Brief, pp. 160-165). The grant was and is not a mere "scrap of paper". It means today what it meant in 1866. Counsel for the Government concede that the appellant company is entitled "to those benefits of the Act of 1866 which **Congress intended** should inure to it in respect to the lands in question". If all of the facts and circumstances surrounding the transaction are considered, then, under the authorities we cite, there cannot be the slightest doubt as to what the intention of the Congress of the United States was in making the grant, or of the railway company in accepting it and acting under it.

In Robert Russell v. Chas. E. Sebastian, decided April 6, 1914 (34 Supreme Court Reporter 517) this Court held that the rule of strict construction contended for by the Government, "Does not deny to public offers a **fair and reasonable** interpretation, **or justify the withholding of that which it satisfactorily appears the grant was intended to convey**".

In the opinion in that case, Mr. Justice Hughes, said:

"When the voice of the State declares that it is bound if its offer is accepted, and the question simply is with respect to the scope of the obligation, we should be slow to conclude that only a revocable license was intended. Moreover, the provision plainly contemplated the establishment of a plant devoted to the described public service and an assumption of the duty to perform that service. That the grant, resulting from an acceptance of the State's offer, constituted a contract, and vested in the accepting individual or corporation a property right, protected by the Federal Constitution, is not open to dispute in view of the repeated decisions of this Court. New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650, 660; New Orleans Water Works Co. v. Rivers, 115 U. S. 674, 680, 681; Walla Walla v. Walla Walla Co., 172 U. S. 1, 9; Louisville v. Cumberland Telephone Co., 224 U. S. 649, 663, 664; Grand Trunk Ry. Co. v. South Bend, 227 U. S. 544, 552; Owensboro v. Cumberland Telephone Co., 230 U. S. 58, 65; Boise Water Co. v. Boise City, 230 U. S. 84, 90, 91; Dillon on Municipal Corporations (5th Ed.), Sec. 1242.

"2. The controversy in the present case relates to the extent to which the grant had become effective through acceptance. It is not contended that the change in the constitution could disturb the company's rights in the streets used previous to the amendment; but it is insisted that such actual user measured the range of the acceptance of the grant and hence defined the limits of its operation.

"In support of this view, the established and salutary rule is invoked that public grants are to be construed strictly in favor of the public; that

ambiguities are to be resolved against the grantee. Charles River Bridge v. Warren Bridge, 11 Pet. 420, 546, 549; Slidell v. Grand Jean, 111 U. S. 412, 437; Detroit Citizens' Ry. Co. v. Detroit Railway, 171 U. S. 48, 54; Knoxville Water Co. v. Knoxville, 200 U. S. 34; Blair v. Chicago, 201 U. S. 400, 471. It has often been stated, as one of the reasons for the rule, that statutes and ordinances embodying such grants are usually drawn by interested parties, and that it serves to frustrate efforts through the skillful use of words to accomplish purposes which are not apparent upon the face of the enactment. Dubuque & Pacific R. R. Co. v. Litchfield, 23 How. 66, 88; Slidell v. Grand Jean, *supra*; Blair v. Chicago, *supra*. But it must also be recognized that this principle of construction does not deny to public offers a fair and reasonable interpretation, or justify the withholding of that which it satisfactorily appears the grant was intended to convey. Winona & St. Peter R. R. Co. v. Barney, 113 U. S. 618, 625; United States v. D. & R. G. Ry. Co., 150 U. S. 1, 14; Minneapolis v. Street Ry. Co., 215 U. S. 417, 427."

Throughout this litigation, counsel for the Government have claimed, in one way or another, that our grant was in no sense a grant of a property right or an executed grant, and that at best it could only be looked upon as a mere gift or promise of a grant in the future, which the Government could take back entirely, or change or modify at will. This contention is completely answered in the recent decision of this Court in the Southern Pacific Mineral Lands Case (Edmund Burke v. Southern Pacific Co., and the Kern Trading & Oil Co., 34 Supreme Court Reporter 907). In that opinion, Mr. Justice Van Devanter said:

"We first notice a contention advanced on the part of the mineral claimants, to the effect that the grant to the railroad company was merely a gift from the United States, and should be construed and applied accordingly. The granting act not only does not support the contention but refutes it. The act did not follow the building of the road; but preceded it. Instead of giving a gratuitous reward for something already done, the act made a proposal to the company to the effect that if the latter would locate, construct and put into operation a designated line of railroad, patents would be issued to the company confirming in it the right and title to the public lands falling within the descriptive terms of the grant. The purpose was to bring about the construction of the road, with the resulting advantages to the Government and the public, and to that end provision was made for compensating the company, if it should do the work, by patenting to it the lands indicated. The company was at liberty to accept or reject the proposal. It accepted in the mode contemplated by the act, and thereby the parties were brought into such contractual relations that the terms of the proposal became obligatory on both. Menotti v. Dillon, 167 U. S. 703, 721. And when, by constructing the road and putting it in operation, the company performed its part of the contract, it became entitled to performance by the Government. In other words, it earned the right to the lands described."

In United States v. Denver & Rio Grande R. R. Co., 150 U. S. 1, this Court said that grants were "not to be so construed as to **defeat the intent of the legislature or to withhold what is given**, either **expressly** or by **necessary** or **fair implication**."

In Winona & St. Peter R. R. Co. v. Barney, 113 U. S. 618, this Court said that land grants

> "are to receive such a construction as will carry out the intent of Congress, however, difficult it might be to give full effect to the language used if the grants were by instruments of private conveyance. To ascertain that intent we must look to the condition of the country when the act was passed, as well as to the purpose declared on their face, and read all parts of them together. * * * When an act, operating as a general law, and manifesting clearly the intention of Congress to secure public advantages, or to subserve the public interests and welfare by means of benefits more or less valuable, offers to individuals or to corporations as an inducement to undertake and accomplish great and expensive enterprises or works of a quasi-public character in or through an immense and undeveloped public domain, such legislation stands upon a somewhat different footing from merely a private grant, and should receive at the hands of the Court a more liberal construction in favor of the purpose for which it was enacted. Bradley v. New York & New Haven R. R., 21 Connecticut, 294; Pierce on Railroads, 491. This is the rule we think properly applicable to the construction of the Act of 1875, rather than the more strict rule of construction adopted in the case of purely private grants. * * * "

These cases are in exact harmony with the text from Blackstone upon which we rely, but which counsel for Government claim has not been followed by this Court (Government's Brief, p. 9).

In Cherokee Nation v. Journeycake, 155 U. S. 196, it was held that

> "In order to determine the meaning of this contract we must place ourselves in the circumstances of the parties at the time, with their surroundings and expectations."

In Northern Pacific R. R. Co. v. Musser-Sauntry Land, Logging & Mfg. Co., 168 U. S. 604, which case involved the construction of a grant of lands to a railroad, it was said:

> "In view of the road's traversing a comparative wilderness, it made a grant of enormous extent. * * * It must be presumed that Congress acted and would act in good faith, and of course there could be no intent to deplete this grant to plaintiff by subsequent legislation in respect to land grants."

Respectfully submitted,

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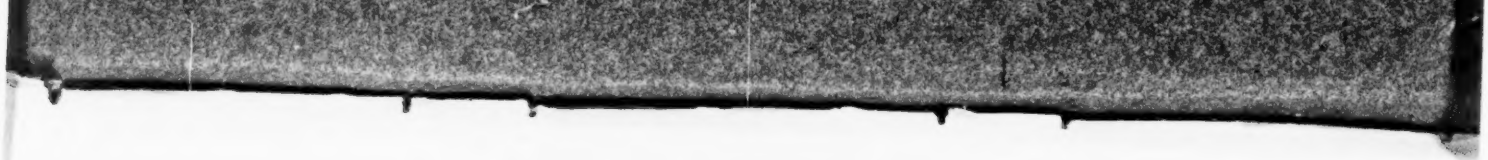

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No. 35.

In the Supreme Court of the United States.

OCTOBER TERM, 1914.

MISSOURI, KANSAS & TEXAS RAILWAY CO., APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

WASHINGTON GOVERNMENT PRINTING OFFICE, 1914

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In the Supreme Court of the United States.

OCTOBER TERM, 1914.

MISSOURI, KANSAS & TEXAS RAILWAY CO., appellant, *v.* THE UNITED STATES.	No. 25.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is an appeal from a judgment of the Court of Claims in favor of the United States in a proceeding against it to recover the value of three and a quarter million acres of land in the State of Oklahoma—formerly Indian Territory. The lands extend from the northern to the southern boundaries of the State—a distance of 243 miles; their

alleged value is $61,287,800; and appellant claims that it was wrongfully deprived thereof, after earning them by construction of its road.

The Government demurred on two grounds: (1) That the matters complained of are not within the jurisdiction of the Court of Claims, and (2) That the petition does not state facts sufficient to constitute a cause of action. As we read the opinions, the demurrer was sustained on both grounds.

The alleged rights of appellant are predicated upon four acts of Congress: Act of March 3, 1863 (12 Stats., p. 772, ch. 98; appendix, p. 47); act of July 1, 1864 (13 Stats., p. 339 ch. 198; appendix, p. 49); act of July 25, 1866 (14 Stats., p. 236, ch. 241; appendix, p. 50; Rec., p. 94); and the act of July 26, 1866 (14 Stats., p. 289, ch. 270; appendix, p. 55; Rec., p. 101).

In order to enable the State of Kansas to aid the construction and operation of three different railroads, these several acts granted, primarily to it, 10 alternate sections of land within a twenty-mile strip for each mile of road. Section 11 of the act of July 25, 1866, provided that whichever of the three companies therein named first completed its railroad to a specific point on the southern boundary of Kansas upon obtaining approval of the President of the United States, should thereafter have the exclusive right to construct and operate its line southward through Indian Territory to a point at or near Preston (now Denison) on the northern boundary of Texas, where it was expected junction

would be made with a railroad then being constructed northward from Galveston; and section 9 provided for grants of land under conditions specified.

Appellant was the first to complete its road to the designated point on the southern boundary of Kansas, and thus secured the right to continue across Indian Territory. It now maintains that under section 9 of the act of July 25, 1866, it became entitled to "alternate sections" on each side of its line through Indian Territory.

> SEC. 9. *And be it further enacted*, That the same grants of lands through said Indian Territory are hereby made as provided in the first section of this act, *whenever the Indian title shall be extinguished by treaty or otherwise*, not to exceed the ratio per mile granted by the first section of this act: *Provided, That said lands become a part of the public lands of the United States.* (Italics ours.)

The "first section," referred to in section 9, granted 10 alternate sections of the public lands within Kansas on each side of the designated road, to be selected within 20 miles thereof.

A proviso to the "first section" reads:

> *Provided*, That any and all lands heretofore reserved to the United States by any Act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same

> are hereby, reserved and excepted from the operation of this act, except so far as it may be found necessary to locate the route of said road through such reserved lands, in which case the right of way two hundred feet in width is hereby granted, subject to the approval of the President of the United States: *And provided further,* That none of the lands hereby granted shall be selected beyond twenty miles from the said road.

When the foregoing acts were passed the land in Indian Territory claimed by appellant was occupied by four Indian tribes—Creeks, Choctaws, Chickasaws, and Cherokees—under treaties with the United States granting them the fee simple title so long as the Indians should not become extinct or abandon the same. The parts of these treaties especially important here may be found (pp. 13 to 22 of this brief). The Indians as tribes continued to occupy the lands until the tribal titles were extinguished, and they were parceled and granted to them in severalty.

The railway company asserts that sections 9 and 11 of the act of July 25, 1866, construed in connection with section 1, gave it an absolute grant *in praesenti*, to these lands, with only the right of possession deferred or suspended until the tribal title should be extinguished; and that this title was extinguished, at which time the company came into the absolute title. Further, that the Government by permitting the lands to be allotted to the Indians in severalty failed to recognize the covenants and

obligations of the grants; and that having thus repudiated its obligations and thereby destroyed appellant's rights it must respond in damages for the present value of the lands.

The Government, admitting only matters well pleaded, denies that the language of section 9 constitutes or was intended to constitute a grant of the lands in controversy, or ever operated to transfer any vested interest therein to the railway company. On the contrary, it maintains that section 9 contains at most a conditional promise of a future grant to be made only if (1) the Indian title should be extinguished, and (2) the lands became a *part of the public lands of the United States.*

The Indian tribal title was extinguished, but the lands never became a part of the public lands of the United States. Consequently, no title ever vested in the appellant.

ARGUMENT.

For present purposes only it is conceded:

(*a*) Appellant constructed and completed its line from the southern boundary of Kansas across Indian Territory to Preston, Tex., in accordance with the act of July 25, 1866, and has continuously operated the same.

(*b*) Appellant is entitled to those benefits of the acts of 1866 which Congress *intended* should inure to it in respect of the lands in question.

(*c*) The Indian *tribal* title to substantially all the lands involved has been extinguished in accordance with acts of Congress and ratified agreements providing for individual allotments to tribal members.

(*d*) Congress had *power* (but no moral right) to cause the removal of the Indians, by force or otherwise, from the lands guaranteed to them and to place the railway company in possession.

(*e*) Congress had *power* to take such measures as it deemed expedient to destroy the tribal relations or organizations of the Indians.

The fundamental question for decision is this:

Did appellant, by virtue of the act of July 25, 1866, acquire a vested property right in lands along its right of way in the Indian Territory, either when the law was passed or at any subsequent time?

It will be convenient to arrange the discussion under the following heads:

First. The terms of the grant must be strictly construed against appellant.

Second. The Indian treaties and rights thereunder should be saved from interference by grants to others.

Third. The Indian treaties make it clear that the Government did not intend by the passage of the act of July 25, 1866, to deprive itself of power to determine how title to the Indian lands should be terminated and to whom they should descend in event the tribal title was extinguished.

Fourth. Considering the Indian treaties in connection with the act of July 25, 1866, it seems plain

that Congress did not intend to make a grant *in praesenti* to appellant.

Fifth. The grant to appellant was not one *in praesenti*, but *in futuro*, depending upon two conditions, neither of which has happened.

Sixth. The manner of extinguishing the tribal title by Congress was a fulfillment of pledges to the Indians and not in conflict with section 9, act of July 25, 1866.

FIRST.

The terms of the grant must be strictly construed against appellant.

It is elementary that the intention of the grantor, gathered from the whole and every part of the conveyance, must prevail, and that the grant must be strictly construed against the grantee.

In the brief for appellant (p. 160) this appears:

> The land grant must be considered in the light of the history of the times and condition of the country; what the parties to the grant had reason to believe it meant, the purposes in view in making and accepting the grant. It must be viewed as a law in the nature of a statutory contract. *It must be liberally construed in favor of the company that fully executed and relied upon it.* (Italics ours.)

In *Rice* v. *R. R. Co.* (1 Black, 358–380) Mr. Justice Clifford in behalf of this court said:

> Taken together these several cases may be regarded as establishing the general doctrine that whenever privileges are granted to a corporation and the grant comes under revision in the courts, such privileges are to be strictly construed against the corporation and in favor of the public, and that nothing passes but what is granted in clear and explicit terms.

In *Leavenworth R. R.* v. *United States* (92 U. S., 733–739), in construing the language of the act of March 3, 1863, pertaining to a grant of lands in Kansas in aid of the construction of a railroad, Mr. Justice Davis said:

> * * * the rules which govern in the interpretation of legislative grants are so well settled by this court that they hardly need be reasserted. They apply as well to grants of lands to States to aid in building railroads as to grants of special privileges to private corporations. In both cases the legislature, prompted by the supposed wants of the public, confers on others the means of securing an object the accomplishment of which it desires to promote but declines directly to undertake.

Dubuque and Pacific Railroad Company v. *Litchfield* (23 How., 66–88), this court quoting from *Gildart* v. *Gladstone* (1 East., 675), said:

> "If the words would fairly admit of different meanings, it would be right to adopt

> that which is more favorable to the interest of the public, and against that of the company, because the company, in bargaining with the public, ought to take care to express distinctly what payments they are to receive, and because the public ought not to be charged unless it be clear that it was so intended."
>
> "The reason of the above rule is obvious—parties seeking grants for private purposes usually draw the bills making them. If they do not make the language sufficiently explicit and clear to pass everything that is intended to be passed, it is their own fault; while, on the other hand, such a construction has a tendency to prevent parties from inserting ambiguous language for the purpose of taking, by ingenious interpretation and insinuation, that which can not be obtained by plain and express terms."

Appellant contends that the doctrine expressed in the foregoing cases is inapplicable because the grant under consideration was bestowed by the Government of its own volition, and not at the request of the company. The brief for appellant (p. 165) says:

> A grant made by the King, *at the suit of the grantee*, was taken most beneficially for the King, and against the party: whereas the grant of the subject is construed more strongly against the grantor. It therefore became usual to insert in the King's grants, that they were made, not at the suit of the grantee, but *ex gratia*, in which cases the

> grants were not construed against the grantee (id.). It may be truly said that in our case the grants were *ex gratia*, and not at our request; it was a proposition which the Government made to us, and which we afterwards accepted.

This argument is refuted by the opinion of Mr. Justice Field in *Slidell* v. *Grandjean* (111 U. S., 437), in which he says:

> It is also a familiar rule of construction that where a statute operates as a grant of public property to an individual, or the relinquishment of a public interest, and there is a doubt as to the meaning of its terms or as to its general purpose, *that construction should be adopted which will support the claim of the Government rather than* that of the individual. Nothing can be inferred against the State. As a reason for this rule it is often stated that such acts are usually drawn by interested parties, and they are presumed to claim all they are entitled to. The rule has been adopted and followed by this court in many instances in the construction of statutes of this description * * *. The rule is a wise one; it serves to defeat any purpose concealed by the skillful use of terms to accomplish something not apparent on the face of the act, and thus sanctions only open dealings with legislative bodies. (Italics ours.)

If there be any question as to the meaning of the terms of the granting act of July 25, 1866, it must be resolved in favor of the Government.

SECOND.

The Indian treaties and rights thereunder should be saved from interference by grants to others.

To construe the act of July 25, 1866, liberally in favor of appellant would be in conflict with the rights of the Indians and contrary to the rule laid down by this court in the *Leavenworth case* (supra, p. 746):

> * * * It would be strange, indeed, if, by such an act, Congress meant to give away property which a just and wise policy had devoted to other purposes. That lands dedicated to the use of the Indians should, upon every principle of natural right, be carefully guarded by the Government and saved from a possible grant is a proposition which will command universal assent. What ought to be done has been done. The proviso was not necessary to do it; but it serves to fix more definitely what is granted by what is excepted. All lands "heretofore reserved" that is, reserved before the passage of the act, "by competent authority, for any purpose whatsoever," are excepted by the proviso. This language is broad and comprehensive. It unquestionably covers these lands. They had been reserved by treaty before the act of 1863 was passed.
>
> [P. 742.] * * * As the transfer of any part of an Indian reservation secured by treaty would also involve a gross breach of

> the public faith, the presumption is conclusive that Congress never meant to grant it.

This same view was reiterated by Mr. Justice Pitney in *Starr* v. *Long Jim* (227 U. S., 613–622), quoting from *Jones* v. *Meehan* (175 U. S., 1, 10, 11):

> In construing any treaty between the United States and an Indian tribe it must always * * * be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.

Worcester v. *Georgia* (6 Peters, 515, 582).

Choctaw Nation v. *U. S.* (119 U. S., 1, 28).

Minnesota v. *Hitchcock* (185 U. S., 373, 402).

THIRD.

The Indian treaties make it clear that the Government did not intend by the passage of the act of July 25, 1866, to deprive itself of power to determine how title to the Indian lands should be terminated and to whom they should descend in event the tribal title was extinguished.

Appellant maintains that Congress by section 9, act of July 25, 1866, agreed to extinguish the Indian title to the lands, and that when this was extinguished absolute title thereto should immediately inure to appellant. This makes it necessary to consider the Indian tribal titles.

The Creeks, Choctaws, Chickasaws, and Cherokees originally resided east of the Mississippi River. By agreements Indian Territory was selected and set apart by the Government as a permanent home for them, where they might live according to their tribal laws and customs.

THE CHEROKEES.

Cherokee treaty of May 26, 1828.

The Cherokee Tribe was divided—some of them having been transferred to the Territory of Arkansas. Those west of the Mississippi, desiring a permanent home, entered into a treaty with the

Government on May 26, 1828 (7 Stats., 311), respecting their removal and title to a portion of the lands involved in this suit.

Article 2 of this treaty declared:

> The United States agree to possess the Cherokees, and *to guarantee it to them forever, and that guarantee is hereby solemnly pledged* of seven millions of acres of land, to be bounded as follows, viz: [Describing the tract embracing Cherokee lands involved in this suit.]
>
> * * * * *
>
> In addition to the seven millions of acres thus provided for and bounded, the United States further guarantee to the Cherokee Nation a perpetual outlet west, and a free and unmolested use of all the country lying west of the western boundary of the above-described limits, and as far west as the sovereignty of the United States and their right of soil extend.

Article 7 provided that the Cherokees would surrender lands in Arkansas granted to them by a former treaty. Coupled with this grant were solemn assurances and guaranties by the United States.

Cherokee treaty of February 14, 1833.

It became necessary to describe more accurately the boundary of the land granted by the treaty of May 26, 1828, and for this and other reasons, on February 14, 1833, a supplemental treaty was entered into (7 Stats., 414). This more particularly

defined the boundaries, reaffirmed the former grant, and reiterated the solemn assurances and guaranties:

> The United States agree to possess the Cherokees, and *to guarantee it to them forever, and that guaranty is hereby pledged,* of seven millions of acres of land to be bounded as follows: [Describing the home tract within which are all Cherokee lands involved in the grant claimed to have been made by the United States to the appellant.]
>
> * * * * *
>
> In addition to the seven millions of acres of land thus provided for and bounded the United States further guarantee to the Cherokee Nation a perpetual outlet west and a free and unmolested use of all the country lying west of the western boundary of said seven millions of acres as far west as the sovereignty of the United States and their right of soil extend * * * and letters patent shall be issued by the United States as soon as practicable for the land hereby guaranteed.

Article 3 contains the following pertinent language:

> *It is moreover agreed by the United States when the Cherokees may desire it, to give them a plain set of laws suited to their condition; also when they may wish to lay off their lands and own them individually a surveyor shall be sent to survey them at the expense of the United States.*

Cherokee treaty of December 29, 1835.

Both the Indians and the Government desiring that members of this tribe east of the Mississippi should reunite with those west thereof in a permanent home, the treaty of New Echota was entered into on December 29, 1835 (7 Stats., 478), with the former. It provided in part:

> ARTICLE 2. Whereas by the treaty of May 6, 1828, and the supplementary treaty thereto of February 14, 1833, with the Cherokees west of the Mississippi, the United States guaranteed and secured to be conveyed by patent to the Cherokee Nation of Indians the following tract of country: [Describing the home tract and the outlet.] * * *
>
> And letters patent shall be issued by the United States as soon as practicable for the land hereby guaranteed.

By the same article the United States covenanted—

> to convey to the said Indians and their descendants by *patent in fee simple* the following additional tract of land, situated between the west line of the State of Missouri and the Osage Reservation. [Describing land known as the 800,000-acre tract.]
>
> ARTICLE 3. The United States also agree that the lands above ceded by the treaty of February 14, 1833, including the Outlet and those ceded by this treaty, shall all be included in one patent executed to the Cherokee Nation of Indians by the President of the United States according to the provi-

sions of the act of May 28, 1830 (4 Stats., ch. 148 p. 411).

The act of May 28 was "An act to provide for *an exchange of lands* with the Indians residing in any of the States or Territories and for their removal west of the Mississippi." By section 3 it provided:

> That in the making of any such exchange or exchanges it shall and may be lawful for the President solemnly to assure the tribe or nation with which the exchange is made that the *United States will forever secure and guarantee to them, and their heirs or successors, the country so exchanged with them;* and, if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same: *Provided always, That such lands shall revert to the United States if the Indians become extinct or abandon the same.* (Italics ours.)

The proviso just quoted appears inapplicable to the grant [treaty May 26, 1828, supra] within which are all Cherokee lands claimed by appellant, and which grant had vested title in the Indians before the act of May 28, 1830, supra, took effect. It was likewise inapplicable to the 800,000-acre tract, because the latter was not an "exchange."

Moreover, section 7 of the act of May 28, 1830, contained the following proviso:

> *Provided,* That nothing in this act contained shall be construed as authorizing or

> directing the violation of any existing treaty between the United States and any of the Indian tribes.

On December 31, 1838, a patent was issued by the United States which recited provisions of the treaties of 1828, 1833, and 1835 in regard to the grants of lands therein contained. (See Brief for Appellant, p. 419.)

Cherokee treaty of July 19, 1866.

On July 19, 1866, the United States and the Cherokee Nation concluded a treaty (14 Stats., 799), agreeing, among other things (Art. XVI), that the United States might settle the friendly Indians in the Cherokee country, have the "*land conveyed in fee simple to each of said tribes, to be held in common or by their members in severalty as the United States may decide,*" and also that the land reserved to the Cherokees might be allotted as follows:

> Article XX. Whenever the Cherokee national council shall request it, the Secretary of the Interior shall cause the country reserved for the Cherokees *to be surveyed and allotted among them*, at the expense of the United States.

THE CHOCTAWS AND CHICKASAWS.

The Choctaw Nation obtained their land in the Indian Territory by a treaty dated September 27, 1830 (7 Stats., 333). Possession was guaranteed by Article II in the following terms:

> The United States under a grant specially to be made by the President of the United States shall cause to be conveyed to the Choctaw Nation a tract of country west of the Mississippi River *in fee simple to them and their descendants, to inure to them while they shall exist as a nation and live on it.*

The Choctaws in return ceded to the United States the entire country they owned and possessed east of the Mississippi River. On March 23, 1842, a patent was issued by the United States to the Choctaw Nation in accordance with this treaty.

January 17, 1837, the Choctaws and Chickasaws entered into "articles of convention and agreement" (11 Stats., 573), Article I of which reads in part as follows:

> It is agreed by the Choctaws that the Chickasaws shall have the privilege of forming a district within the limits of their country, to be held on the same terms that the Choctaws now hold it, except the right of disposing of it, which is held in common with the Choctaws and Chickasaws, to be called the "Chickasaw district of the Choctaw Nation."

Choctaw and Chickasaw treaty of June 22, 1855.

On June 22, 1855, a treaty was concluded with the Choctaw and Chickasaw Tribes (11 Stats., 611), article one of which provided in part as follows:

> And pursuant to an act of Congress approved May 28, 1830, the United States do

> hereby forever secure and guarantee the lands embraced within the said limits to the members of the Choctaw and Chickasaw Tribes, their heirs and successors, to be held in common, so that each and every member of either tribe shall have an equal, undivided interest in the whole: *Provided, however,* No part thereof shall ever be sold without the consent of both tribes; and that said land shall revert to the United States if said Indians and their heirs become extinct or abandon the same.

Choctaw and Chickasaw treaty of April 28, 1866.

On April 28, 1866, a treaty was concluded with the Choctaw and Chickasaw Tribes (14 Stats., 769), wherein it was said in Article XI that—

> * * * it is believed that *the holding of said land in severalty* will promote the general civilization of said nations * * *.

And it was also agreed that the Choctaws and Chickasaws might have *their lands surveyed and divided up into sections,* townships, and ranges, and laid off accordingly; and, further (Art. XV), that each Indian might have the right to one-quarter section of land.

THE CREEKS.

The Creek or Muskogee Nation acquired their lands in Indian Territory by treaty of February 14,

1833 (7 Stats., 417). These were described by natural landmarks in Article II, and a conveyance by patent was provided for in Article III as follows:

> The United States will grant a patent, *in fee simple*, to the Creek Nation of Indians for the land assigned said nation by this treaty or convention, whenever the same shall have been ratified by the President and Senate of the United States and the right thus guaranteed by the United States shall be continued to said tribe of Indians so long as they shall exist as a nation and continue to occupy the country hereby assigned them.

A patent was issued August 11, 1852, to the Creek Nation for the lands so assigned.

On June 14, 1866 (14 Stats., 785), a treaty was concluded with the Creek Nation whereby in Art. III it was agreed that--

> * * * the eastern half of said Creek lands being retained by them shall, *except as herein otherwise stipulated, be forever set apart as a home for said Creek Nation.*

Article V provided that the Creeks might sell to the United States or any company duly authorized by Congress, subject to the approval of the President, any of their lands lying along the contemplated railroad, within certain limits, such land not being owned or legally occupied by any member of the Creek Nation.

Summary of Indian title previous to July 25, 1866.

The purpose of the extensive references to the various treaties upon which the right of these

Indians to the lands in controversy was based is to demonstrate that such titles were of a better and higher character than the ordinary Indian title arising from aboriginal possession and occupancy. Furthermore, on the very eve of the passage of the act of July 25, 1866, Congress had reaffirmed the fee simple titles in the Indians so long as they did not abandon the lands; in the free exercise of their choice they might have held the lands forever. Previously, also, the Government had entered into treaties granting to the Cherokees, Choctaws, and Chickasaws the right to have their lands surveyed and occupied severally and had granted to the Creeks the right under under certain conditions and limitations to sell their lands. Moreover, the Indians had ceded other valuable lands to the Government, as a part of the consideration for their receiving title to the lands in Indian Territory.

In the light of the titles conveyed by the United States to these Indian tribes the reason is obvious for the insertion in section 9 of the act of July 25, 1866, the conditions (1) that the Indian title should be extinguished, and (2) that the lands should become part of the public lands of the United States. Congress did not say that when the Indian title was extinguished the lands should become public lands. On the contrary, the clear purport of the proviso of section 9 is that Congress, in view of the title held by the Indians, intended to reserve to itself the decision as to whether—in the event the Indian title ever was extinguished—their lands should be-

come " public lands of the United States " in the accepted meaning of that term.

It would have been unconscionable for Congress to have agreed, as contended by appellant, to extinguish the title of the Indians and vest absolute title in appellant.

FOURTH.

Considering the Indian treaties in connection with the act of July 25, 1866, it seems plain that Congress did not intend to make a grant in praesenti to appellant.

An examination of the act of July 25, 1866, shows that the first six sections of the act made a grant *in praesenti* of lands in the State of Kansas for the use of the Kansas & Neosho Valley Railroad. The seventh section contains an acceptance of this grant by the railroad company. Sections 1 to 7, inclusive, contain no reference to a grant through Indian Territory. Section 8 empowered the railroad company to extend and construct its railroad from the southern border of Kansas south through Indian Territory and granted it a right of way through the Territory *wherever such right was reserved to the United States by treaty with the Indian tribe.* Where the right of way was not reserved to the United States, the company was compelled to get the consent of the tribe, with the approval of the President.

Comparing section 8 with the treaties entered into with the Choctaws April 28, 1866 (14 Stats., 769) ; Creeks, June 14, 1866 (14 Stats., 785) ; Chero-

kees, July 19, 1866 (14 Stats., 799), it will be found to be so correlated with certain articles of the several treaties that, apparently, Congress formulated the section to conform with the treaties.

Article XI of the Cherokee treaty declares that—

> The Cherokee Nation hereby grant a right of way not exceeding two hundred feet wide * * * to any company or corporation which shall be duly authorized by Congress to construct a railroad from any point north to any point south and from any point east to any point west of, and which may pass through, the Cherokee Nation. Said company * * * shall be protected in the discharge of their duties, and at all times subject to the Indian intercourse laws, now or which may hereafter be enacted and be in force in the Cherokee Nation.

The Choctaws and Chickasaws in Article VI of their treaty consented in substance to the terms set forth in Article XI of the Cherokee treaty.

> ARTICLE VI. The Choctaws and Chickasaws hereby grant a right of way through their lands to any company or companies which shall be duly authorized by Congress, or by the legislatures of said nations, respectively, and which shall, with the express consent and approbation of the Secretary of the Interior, undertake to construct a railroad through the Choctaw and Chickasaw Nations from the north to the south thereof, and from the east to the west side thereof, in accordance with the provisions of the 18th

> article of the treaty of June twenty-second, one thousand eight hundred and fifty-five, which provides that for any property taken or destroyed in the construction thereof full compensation shall be made to the party or parties injured, to be ascertained and determined in such manner as the President of the United States shall direct. But such railroad company or companies, with all its or their agents and employees shall be subject to the laws of the United States relating to the intercourse with Indian tribes, and also to such rules and regulations as may be prescribed by the Secretary of the Interior for that purpose. * * *

There is similar consent by the Creeks in Article V of their treaty.

> ART. V. The Creek Nation hereby grant a right of way through their lands to the Choctaw and Chickasaw country, to any company which shall be duly authorized by Congress, and shall, with the express consent and approbation of the Secretary of the Interior, undertake to construct a railroad from any point north of to any point in or south of the Creek country, and likewise from any point on their eastern to their western or southern boundary, but said railroad company, together with all its agents and employees, shall be subject to the laws of the United States relating to intercourse with Indian tribes, and also to such rules and regulations as may be prescribed by the Secretary of the Interior for that purpose.

It is evident that the language of section 8 of the act of July 25, 1866, was framed in express recognition of the covenants contained in these several articles.

Article VI of the Choctaw treaty provided:

> And it is also stipulated and agreed that the nation through which the road or roads aforesaid shall pass may subscribe to the stock of the particular company or companies such amount or amounts as they may be able to pay for in alternate sections of unoccupied lands for a space of six miles on each side of said road or roads, at a price per acre to be agreed upon between said Choctaw and Chickasaw Nations and the said company or companies, subject to the approval of the President of the United States.

Article V of the treaty with the Creeks provided:

> * * * and the Creeks agree to sell to the United States, or any company duly authorized as aforesaid, such lands not legally owned or occupied by a member or members of the Creek Nation lying along the line of said contemplated railroad, not exceeding on each side thereof a belt or strip of land three miles in width, at such price per acre as may be eventually agreed upon between said Creek Nation and the party or parties building said road, subject to the approval of the President of the United States.

Manifestly, section 10 of the act of July 25, 1866, was likewise in recognition and fulfillment of the covenants of the treaties quoted.

> SEC. 10. *And be it further enacted*, That said Kansas and Neosho Valley Railroad Company, its successors and assigns, shall have the right to negotiate with and acquire from any Indian nation or tribe, authorized by the United States to dispose of lands for railroad purposes, and from any other nation or tribe of Indians through whose lands said railroad may pass, subject to the approval of the President of the United States, or from any company or parties incorporated or authorized for such purposes, by such nation or tribe, or which such parties may have acquired under the laws of the United States.

Applying the same rule of relation to the construction of section 9 of the foregoing act, its object and intent are clear.

Thus the treaty with the Cherokees provided (14 Stats., 799, 805):

> ARTICLE XX. Whenever the Cherokee National Council shall request it, the Secretary of the Interior shall cause the country reserved for the Cherokees to be surveyed and allotted among them, at the expense of the United States.

Subsequently, in November, 1866, the Cherokee constitution was amended by the nation in a number of important provisions. Among them section 2 of Article I is as follows:

> The lands of the Cherokee Nation shall remain common property until the national council shall request the survey and allotment of the same, in accordance with the pro-

> visions of article 20 of the treaty of July 19, 1866, between the United States and the Cherokee Nation.

The treaty with the Chickasaws and Choctaws of April 28, 1866 (14 Stats., 769), after reciting the fact that the land occupied by these two nations, as described in the treaty of June 28, 1855, was held in common, and that *it would promote the civilization of the said nations* and be to their best interest to have their lands allotted to individual members of the tribe in severalty, provided, by articles 11 to 36, inclusive, that their lands should be so allotted and surveys made in the same manner that public lands of the United States were surveyed. The method of selection of allotments and certain reservations from allotment were set out with much particularity, as well as the manner in which all disputes should be settled. Article 33 provided:

> All lands selected as herein provided shall thereafter be held in severalty by the respective parties, and the unselected land shall be common property of the Choctaw and Chickasaw Nations, in their corporate capacities, subject to the joint control of their legislative authorities.

In view of the covenants and promises thus solemnly made to three of these Indian nations only a few days before the passage of the act of July 25, 1866, manifestly the proviso of section 9 thereof was enacted to enable the United States to fulfill

its promises should the tribes, through their national councils, so request.

The only suggestion offered by appellant in answer to this argument is that by the treaties the surface rights only were allotted to the Indians, and that it was not intended that there should be a future division of the lands among the individuals of the respective nations. This unusual refinement and limitation of the word "allotment" is contrary to the customary interpretation by this court when applied to lands occupied by Indians under treaties.

In the case of *Worcester* v. *Georgia* (6 Peters, 582), it was stated that the word "allotted" must be interpreted in such a way as to give it the meaning applied by the unlettered Indian mind.

> *Choctaw Nation* v. *United States* (119 U. S., 1–28).
>
> *Minnesota* v. *Hitchcock* (185 U. S., 373–402).

When the Indians of these four nations relinquished the lands upon which they had formerly resided, were transferred to the lands in Indian Territory, and the Government covenanted with them that they should have the fee-simple title so long as they did not abandon the lands, and by further treaty granted to them allotments in severalty, is it not reasonable to suppose that they understood the word "allotment" in the treaties to mean that the lands would be surveyed and each Indian would take his separate allotment?

FIFTH.

The grant to appellant was not one in praesenti, but in futuro, depending upon two conditions, neither of which has happened.

Appellant asserts on page 167 of its brief that—

> The grant was a grant *in præsenti*. Every condition of the grant was complied with by the railroad company and, upon the extinguishment of the Indian title, the lands became a part of the public land of the United States, and the Government, by breaching the grant, elected to respond in damages.

It has been settled that a grant *in præsenti*, in aid of the construction of a railroad, passes the title in fee to the lands comprehended by the granting act on the date of the filing by the company of its map of the definite location of its line of road. The title, however, dates back and takes effect by relation from the date of the approval of the granting act. The fee does not, in the absence of express provision, pass to lands which have been reserved or set apart for some other purpose as, for example, to lands occupied and set aside for Indian tribes, prior to the passage of the granting act or of the filing of the map of definite location. This was decided in the *Leavenworth* case, supra. The importance of that case in the present discussion warrants a somewhat full statement of the issues

there involved. Certain lands had been reserved for the Osage Nation in Kansas by treaty of 1825, "*so long as they may choose to occupy the same.*" By subsequent treaty in 1865, the Indian nation ceded part of these lands (to which the railroad company claimed title through the act of March 3, 1863) to the United States in consideration of the payment of $300,000 to the Indian nation and upon condition that the lands would be sold by the Government for cash, the proceeds to go into the funds of the Indian tribe.

Two years previous to this treaty of cession of 1865, viz, March 3, 1863 (12 Stats., 772, ch. 98), Congress had passed an act granting alternate sections of land to Kansas to aid in the construction of this road, the words of the grant being, "That there be, and is hereby, granted," etc., the act providing, however—

> That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be, and the same are hereby, reserved to the United States from the operations of this act, except so far as it may be found necessary to locate the routes of said road and branches through such reserved lands; in which case the right of way only shall be granted, subject to the approval of the President of the United States.

The Legislature of Kansas in 1864 accepted the grant and authorized the railway to build the road. The company filed its map of definite location in 1868, showing the road through the Osage lands thus ceded by the treaty of 1865.

The railroad company's claim was strengthened by another act, approved April 19, 1871 (17 Stats., p. 5, ch. 21), by which it was authorized to relocate any portion of its line south of a designated point, within the limits of the grant of 1863, but not so as to change, enlarge, or diminish the extent of the grant.

In 1871, upon certificate of the governor that the road had been completed, certified lists of the odd-numbered sections were prepared by the proper officers of the Interior Department, which included the Osage lands, and in 1873 patents for these lands were issued to the company.

The United States maintained, as in the action at bar, that its grant to Kansas did not dispose of or include the Osage lands. The company insisted, as appellant does here, that although not operating upon any specific section until the road was located, the grant then attached to the sections in controversy, as by the extinction of the Indian title they had become "public lands," in the proper sense of the term, and were therefore included within the terms of its grant.

Mr. Justice Davis declared that even if the proviso of the granting act excepting from its operation lands reserved for any purpose whatever were

omitted, the language of the act nevertheless could not be construed to include the Osage lands, as they were not subject to disposal and were therefore not public lands. With respect to the language of the granting act, he said (p. 742):

> * * * The legislation which reserved it for any purpose excluded it from disposal as the public lands are usually disposed of; and this act discloses no intention to change the long-continued practice with respect to tracts set apart for the use of the Government or of the Indians. *As the transfer of any part of an Indian reservation secured by treaty would also involve a gross breach of the public faith, the presumption is conclusive that Congress never meant to grant it.* (Italics ours.)

The dissenting opinion of Mr. Justice Field, concurred in by Swayne and Strong, JJ., is of particular interest. The grounds of their dissent were that the language of the act of 1863 passed the title to the lands *in praesenti* to the company, whose stockholders in reliance upon this title contributed large sums of money to build the road.

Seventeen years after the decision in the Leavenworth case, Mr. Justice Field announced the decision of this court in *Bardon* v. *Northern Pacific Railroad Co.* (145 U. S., 535, 543). The controversy in this case arose over the grant of public lands to the Northern Pacific Railroad Co. by act of July 2, 1864 (13 Stats., 365, chap., 217). After

an extensive review of the issues involved in the *Leavenworth case*, Mr. Justice Field said:

> Three justices, of whom the writer of this opinion was one, dissented from the majority of the court in the *Leavenworth case;* but the decision has been uniformly adhered to since its announcement, and this writer, after a much larger experience in the consideration of public-land grants since that time, now readily concedes that the rule of construction adopted, that, in the absence of *any express provision indicating otherwise*, a grant of public lands only applies to lands which are at the time free from existing claims, is better and safer, both to the Government and to private parties, than the rule which would pass the property subject to the liens and claims of others. The latter construction would open a wide field of litigation between the grantees and third parties.

Appellant, on the other hand, relies upon *Butts* v. *Northern Pacific Railroad Company* (119 U. S., 55), which grew out of the act of July 2, 1864 (13 Stats., p. 365, ch. 217), granting lands to the Northern Pacific Railroad Company to which the Indian title had not been extinguished. This court held that the grant was one *in praesenti* and operated to convey the fee simple title to the company, subject to the right of occupancy of the Indians. The difference between the Butts case and the one at bar is that in the former *Congress agreed that the United States should extinguish the Indian*

title, whereas in the case at bar Congress not only did not agree that the United States would extinguish the title, but reserved to itself the right to determine when, if ever, the Indian title should be extinguished and how the same should be done.

Appellant also relies upon the case of *Kindred* v. *The Union Pacific R. R. Co.* (225 U. S., 582).

As presented by counsel this case might seem to be opposed to the position of the Government. The controversy arose out of a grant under the act of July 1, 1862 (12 Stats., 489, chap. 120), wherein the predecessor in title of the Union Pacific Railroad acquired a right of way 400 feet in width across certain lands in Kansas within the Delaware Diminished Indian Reservation. These lands had been assigned in severalty to individual Delawares under the treaty of May 30, 1860 (12 Stats., 1129), which also provided for such right of way.

The line of differentiation, however, between the *Kindred case* and the one at bar is found on page 596 of the opinion, as follows:

> But it is said that the right of way section was inapplicable because it was confined to "public lands," a term used to designate such lands as are subject to sale or other disposal under general laws. No doubt such is its ordinary meaning, but it sometimes is used in a larger and different sense. We think that is the case here, *first, because the provision in the same section, that the United States should extinguish as rapidly as might be the Indian title to all lands required for*

> *the right of way, implies that Indian lands as to which Congress properly could grant a right of way were intended to be included.* (Italics ours.)

The intent of Congress is shown by the agreement of the United States contained in the act itself to extinguish the Indian title as rapidly as possible, and by the further fact that the Indians whose lands were affected had given their consent by previous treaty. Therefore this decision is in harmony with the court's ruling in the *Butts case, supra.*

It is seen from the Leavenworth and other cases cited that this court has declared in substance that:

(*a*) A grant *in praesenti* is one attaching only to lands of the public domain subject to sale or other disposal.

(*b*) That the words "*There be, and hereby is granted,*" which language is in substance the same as the words of donation found in section 9, act 25 July, 1866, are words of donation, and import a grant *in praesenti* of "public lands," *unless there are qualifying terms contained in the grant.*

(*c*) That where lands have been reserved to Indians, so long as they shall not abandon them, such lands are excluded from the terms of a grant containing the phrase "There be, and hereby is granted."

(*d*) That it is not necessary where lands have been reserved to Indians to insert in the granting act any clause or reservation.

Does section 9 of the act of July 25, 1866, contain a grant *in praesenti?*

It is conceded that all of the lands in Indian Territory were occupied by or in the possession of Indian tribes at the time of the passage of this act. Because of this fact appellant contends that if section 9 does not contain a grant *in praesenti,* with a covenant that the United States will extinguish the Indian title, it is meaningless. In the light of the Indian treaties of 1866, however, the intention of Congress is very clearly revealed. The Government had already bound itself to give the lands to the Indians in severalty if demanded, and when Congress incorporated the proviso in section 9 in effect it said to the railroads:

> You will have the exclusive right, with the consent of the Indians, to build your line from north to south through the Indian Territory and to thus connect the great transcontinental lines to the north with the tidewaters of the Gulf. You are granted permission to take from the lands adjacent to your line of road material for the construction thereof; to procure free of cost from the Indian tribes lands for terminal stations, depots, etc., and thereby facilitate the construction and maintenance of your lines. In the future, if the Indian title to the lands adjoining the line of your road is extinguished and the title becomes vested in the Government as public lands, you will be given a grant of lands through the Territory in the same ratio per mile as now granted

> to you in Kansas. But in the event that the Indian title is not extinguished and the lands do not become public lands, or should the Indians call upon us to allot the lands to the individual members, as you are bound to take notice the United States has covenanted and promised by treaty to do, then you can not receive this land.

The proposition offered the railway company was not a pledge on the part of Congress to extinguish the Indian title or to transform its existing status to that of public lands, as was the situation in the Butts case. It was a conditional promise of a future grant, dependent upon the United States coming into the full title and enjoyment of the lands free from any claim on the part of the Indians.

It may be added that even though there had been no covenant to allot the lands to the individual Indians in the treaties of 1866, still the subsequent refusal of the United States to carry out the terms of the grant to appellant would not of itself have afforded the company a right of action. (*Minnesota* v. *Hitchcock*, 185 U. S., 393, 394.)

The tribal territory never became public lands of the United States.

Conceding that the tribal title has been extinguished, the Government maintains that the lands in question never became "public lands" of the

United States and consequently that title could not vest in appellant.

In *Newhall* v. *Sanger* (92 U. S., 761, 763), this court said that "The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws."

In the *Leavenworth case, supra,* construing this term in the grant of lands to Kansas in connection with the Osage Reservation, the court said in substance that lands held under a similar Indian tribal title were not public lands, for the Indians were left free by treaty to occupy them, and they were, therefore, not subject to sale and disposal at the time of the grant.

In *United States* v. *Thomas* (151 U. S., 577, 583), the court said:

> Mr. Justice Lamar, while Secretary of the Interior, had frequent occasion to consider the nature and effect of the grant of school lands where the title was at all encumbered or doubtful; and on this subject he said (6 L. Dec., 418) that the true theory was this: "That where the fee is in the United States at the date of survey, and the land is so encumbered that full and complete title and right of possession can not then vest in the State, the State may, if it so desires, elect to take equivalent lands in fulfillment of the compact, or it may wait until the *right and title of possession unite in the Government,* and then satisfy its grant by taking the lands

specifically granted." And this view he considered " as fully sustained by the decisions of the courts and the opinions of the Attorneys General." (Italics ours.)

In *Northern Lumber Co.* v. *O'Brien* (139 Fed., 614, 616–617).

Mr. Justice Van Devanter declared:

> The words " public land " have long had a settled meaning in the legislation of Congress, and, when a different intention is not clearly expressed, are used to designate such land as is subject *to sale or other disposal under general laws, but not such as is reserved by competent authority for any purpose or in any manner, although no exception of it is made.* (*Bardon* v. *Northern Pacific R. R. Co., supra; Wilcox* v. *McConnell*, 13 Pet., 498, 513, 10 L. Ed., 264; *Leavenworth, etc., R. R.* v. *United States*, 92 U. S., 733, 741, 745, 23 L. Ed., 634; *Newhall* v. *Sanger*, 92 U. S., 761, 23 L. Ed., 769; *Doolan* v. *Carr*, 125 U. S., 618, 630, 8 Sup. Ct., 1228, 31 L. Ed., 844; *Cameron* v. *United States*, 148 U. S., 301, 309, 13 Sup. Ct., 595, 37 L. Ed., 459; *Mann* v. *Tacoma Land Co.*, 153 U. S., 273, 284, 14 Sup. Ct., 820, 38 L. Ed., 714; *Barker* v. *Harvey*, 181 U. S., 481, 490, 21 Sup. Ct., 690, 45 L. Ed., 963; *Scott* v. *Carew*, 196 U. S., 100, 109, 25 Sup. Ct., 193, 49 L. Ed., 403.)

It would seem from these authorities that the lands in question never became " public lands of the United States," because they never became sub-

ject to homestead preemption entry or sale or disposal under the general laws.

Appellant, however, asserts that Congress covenanted with the railroad company to extinguish the Indian title, and that upon the extinguishment thereof the lands became public lands and the grant to the railroads became effective by relation as of the date of the act.

If by extinguishment of the tribal title they became public lands of the United States, why the proviso in section 9—

> That said lands become a part of the public lands of the United States.

Under appellant's contention the purpose of the proviso would be defeated and its language become mere surplusage.

There could not be a grant in praesenti because there was no ascertained grantee.

Section XI of the act of July 25, 1866, contains the following proviso:

> That should the Leavenworth, Lawrence and Fort Gibson Railroad Company, or the Union Pacific Railroad Company, southern branch, construct and complete its road to that point on the southern boundary of the State of Kansas where the line of said Kansas and Neosho Valley Railroad shall cross the same before the said Kansas and Neosho

> Valley Railroad Company shall have constructed and completed its said road to said point, then and in that event the company so first reaching in completion the said point on the southern boundary of the State of Kansas shall be authorized, upon obtaining the written approval of the President of the United States, to construct and operate its line of railroad from said point to a point at or near Preston, in the State of Texas, with grants of land according to the provisions of this act, * * *.

It will thus be seen that the company which would partake of the benefits under sections 8 and 9 of this act would be the one first completing its road to the southern boundary of Kansas. Until this was determined there could not be an ascertained grantee.

In the case of *Hall* v. *Russell* (101 U. S., 503–509), this court said:

> It is always to be borne in mind, in construing a congressional grant, that the act by which it is made is a law as well as a conveyance, and that such effect must be given to it as would carry out the intent of Congress. There can not be a grant unless there is a grantee, and consequently there can not be a present grant unless there is a present grantee. If, then, the law making the grant indicates a future grantee and not a present one, the grant will take effect in the future and not presently. In all the cases in which we have given these words, "That there shall be, and hereby is, granted" the effect of an immediate and present transfer it will

> be found that the law has designated a grantee qualified to take according to the terms of the law and actually in existence at the time.

It is manifest, that on July 25, 1866, there was not that certainty in the designation of the grantee that must exist in order that the grant may be one *in praesenti*.

SIXTH.

The manner of extinguishing the tribal title by Congress was a fulfillment of pledges to the Indians and not in conflict with section 9, act of July 25, 1866.

Conforming to its pledge in the Indian treaties of 1866 to allot the lands in severalty, Congress created the Dawes Commission by act of March 3, 1893 (27 Stats., 612, chap. 209), entitled "An act making appropriations for current and contingent expenses and fulfilling treaty stipulations with Indian tribes for fiscal year ending June 30, 1894." The purpose of this act was to negotiate with a view to the extinguishment of the national or tribal title, either by cession of the same, or some part thereof, or by allotment and division to the individual Indians. For this purpose, after the terms of the agreement with the Indians had been accepted, the

commissioners were authorized to have the lands surveyed. The commission made little headway. Finally it was decided that there must be a change in the tenure of the tribal property of the Indians. Congress was informed that one serious obstacle to the allotment was the claim of appellant to the Indian lands, which it had urged against allotment at every stage of the proceedings. Thereupon Congress passed the act of June 28, 1898, known as the Curtis Act (30 Stats., 495, chap. 517), which provided for additional civil and criminal laws to be extended over the Indian Territory; the making of a roll of the citizens of each tribe; the completion of the survey of the lands, and upon the completion of such survey, the allotting by the Dawes Commission of " the exclusive use and occupancy of the surface " to the Indians. The act also provided for the setting aside of certain lands for town sites, schools, churches, burying grounds, etc., to all of which appellant filed its objections before the commission.

On March 1, 1901 (31 Stats., p. 861, ch. 676), Congress passed an act ratifying an agreement theretofore made with the Creek Nation providing for the allotment of all of its lands to its individual citizens, and, after prescribing in detail how this should be done, incorporated therein section 23, a portion of which is as follows:

> The transfer of the title of the Creek Tribe to individual allottees and to other persons, as provided in this agreement, shall not inure

> to the benefit of any railroad company nor vest in any railroad company any right, title, or interest in or to any of the lands in the Creek Nation.

By the act of July 1, 1902 (32 Stats., 641, ch. 1362), Congress ratified and confirmed an agreement with the Choctaws and Chickasaws similar to the one made with the Creeks, and on the same day by act (32 Stats., 716, ch. 1375) ratified and confirmed a like agreement with the Cherokees.

On March 2, 1906, by joint resolution, Congress provided for the continuance of the tribal existence and tribal government until the property of such tribes, or the proceeds thereof, should be distributed among the individual members of the respective tribes.

On April 26, 1906 (34 Stats., p. 137, ch. 1876), an act was passed providing for the final disposition of the affairs of the Five Civilized Tribes. Section 27 expressly declared:

> That the lands belonging to the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes, upon the dissolution of said tribes, *shall not become public lands nor property of the United States*, but shall be held in trust by the United States for the use and benefit of the Indians respectively comprising each of said tribes, and their heirs as the same shall appear by the rolls as finally concluded as heretofore and hereafter provided for: *Provided*, That nothing herein contained shall interfere with any allotments

> heretofore or hereafter made or to be made under the provisions of this or any other act. (Italics ours.)

From these concluding acts of Congress it is apparent that subsequent Congresses understood the meaning of the proviso in section 9, and were carrying out the terms and provisions of the treaties of 1866; that Congress never understood that the lands in question could or did become public lands of the United States by the mere extinguishment of the tribal title; and that after mature consideration it decided to exercise the right retained in the proviso of section 9 to dispose of the Government's reversionary interest by granting the lands to the Indians in severalty. This being the plain intention at all times, the conclusion of the whole matter is that the lands never became public lands of the United States, and the condition upon which the title might have inured to the appellant having failed, it can not now be heard to assert title thereto. Never having a right to the vested title, there could have been no breach of contract and therefore no claim for the value of these lands.

It is submitted that the ruling of the Court of Claims was correct, and should be affirmed.

JOHN W. DAVIS,
Solicitor General.
HUSTON THOMPSON,
Assistant Attorney General.

APPENDIX.

Act of March 3, 1863 (12 Stats., p. 772).

Chap. XCVIII.—*An Act for a Grant of Lands to the State of Kansas, in alternate Sections, to aid in the Construction of certain Railroads and Telegraphs in said State.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there be, and is hereby, granted to the State of Kansas, for the purpose of aiding in the construction: First, of a railroad and telegraph from the city of Leavenworth by the way of the town of Lawrence, and via the Ohio City crossing of the Osage River, to the southern line of the State, in the direction of Galveston bay in Texas, with a branch from Lawrence by the valley of the Wakarusa River, to the point on the Atchison, Topeka, and Santa Fe Railroad where said road intersects the Neosho River. Second, of a railroad from the city of Atchison, via Topeka, the capital of said State, to the western line of the State, in the direction of Fort Union and Santa Fe, New Mexico, with a branch from where this last-named road crosses the Neosho, down said Neosho valley to the point where the said first-named road enters the said Neosho valley; every alternate section of land, designated by odd numbers, for ten sections in width on each side of said

roads and each of its branches. But in case it shall appear that the United States have, when the lines or routes of said road and branches are definitely fixed, sold any section or any part thereof, granted as aforesaid, or that the right of preemption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected, for the purposes aforesaid, from the public lands of the United States nearest to tiers of sections above specified, so much *land, in alternate sections or parts of sections, designated by odd numbers,* as shall be equal to such lands as the United States have sold, reserved, or otherwise appropriated, or to which the rights of preemption or homestead settlements have attached as aforesaid; which lands, thus indicated by odd numbers and selected by direction of the Secretary of the Interior as aforesaid, shall be held by the State of Kansas for the use and purpose aforesaid: *Provided,* That the land to be so selected shall, in no case, be located further than twenty miles from the lines of said road and branches: *Provided, further,* That the lands hereby granted for and on account of said *roads* and branches severally, shall be exclusively applied in the construction of the same, and for no other purpose, whatever, and shall be disposed of only as the work progresses through the same, as in this act hereinafter provided: *Provided, also,* That no part of the land granted by this act shall be applied to aid in the construction of any railroad or part thereof, for the construction of which any previous grant of land or bonds may have been made by Congress: *And provided, fur-*

ther, That any and all lands heretofore reserved to the United States by any act of Congress, or *in any other manner by competent authority*, for the purpose of aiding in any object of internal improvement, *or for any other purpose whatsoever*, be, and the same are hereby, *reserved to the United States from the operations of this act*, except so far as it may be found necessary to locate the routes of said road and branches through such reserved lands; in which case the right of way only shall be granted, subject to the approval of the President of the United States.

* * * * *

Act of July 1, 1864 (13 Stats., p. 339).

Chap. CXCVIII.—*An Act making an additional Grant of Lands to the State of Kansas to aid in the Construction of Railroad and Telegraph Lines.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there be, and hereby is, granted to the State of Kansas, to aid in the construction of a railroad and telegraph line from Emporia, via Council Grove, to a point near Fort Riley, on the branch Union Pacific Railroad, in said state, every alternate section of land designated by odd numbers for ten sections in width on each side of said road: *Provided*, That this grant shall be subject to all the provisions, restrictions, limitations, and conditions, in regard to selection and location of lands and otherwise, of an act of congress approved March three, eighteen hundred and sixty-three, entitled "An act for a grant of lands to the State of Kansas, in alternate sections to aid in the

construction of certain railroads and telegraphs in said state ": *Provided,* That said railroad shall be a public highway and shall transport troops and munitions of war of the United States free of charge.

* * * * *

Act of July 25, 1866 (14 Stats., p. 236).

Chap. CCXLI.—*An Act granting Lands to the State of Kansas to aid in the Construction of the Kansas and Neosho Valley Railroad and its Extension to Red River.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of aiding the Kansas and Neosho Valley Railroad Company, the same being a corporation organized under the laws of the State of Kansas, to construct and operate a railroad from the eastern terminus of the Union Pacific Railroad, eastern division, at the line between Kansas and Missouri, at or near the mouth of the Kansas River, on the south side thereof, southwardly, through the eastern tier of counties in Kansas, with a view of its extension, so as to effect a junction at Red River with a railroad now being constructed from Galveston to Red River at or near Preston, in Texas, there is hereby granted to the State of Kansas, for the use and benefit of said railroad company, every alternate section of land or parts thereof, designated by odd numbers, to the extent of ten sections per mile on each side of said road, to be selected within twenty miles *of from* [of] the line of said road; but in case it shall appear that the United States have, when the line of said road is definitely located, sold any section, or any

part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid, from the public lands of the United States nearest to the sections above-specified so much land as shall be equal to the amount of such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached as aforesaid, which lands, thus indicated by the direction of the Secretary of the Interior, shall be reserved and held for the State of Kansas for the use of said company by the said Secretary for the purpose of the construction and operation of said railroad, as provided by this act: *Provided*, That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby, reserved and excepted from the operation of this act, except so far as it may be found necessary to locate the route of said road through such reserved lands, in which case the right of way two hundred feet in width is hereby granted, subject to the approval of the President of the United States: *And provided, further*, That none of the lands hereby granted shall be selected beyond twenty miles from the said road.

* * * * *

Sec. 6. *And be it further enacted*, That the right of way through the public lands be, and the same

is hereby, granted to said Kansas and Neosho Valley Railroad Company, its successors and assigns, for the construction of a railroad as proposed; and the right is hereby given to said corporation to take from the public lands adjacent to the line of said road material for the construction thereof. Said way is granted to said railroad to the extent of one hundred feet in width on each side of said road where it may pass through the public domain; also all necessary ground for station buildings, workshops, depots, machine-shops, switches, side-tracks, turn-tables, and water-stations.

SEC. 7. *And be it further enacted,* That the acceptance of the terms, conditions and impositions of this act by the said Kansas and Neosho Valley Railroad Company shall be signified in writing, under the corporate seal of the said company, duly executed pursuant to the direction of its board of directors first had and obtained, which acceptance shall be made within one year after the passage of this act, and not afterwards, and shall be deposited with the Secretary of the Interior.

SEC. 8. *And be it further enacted,* That said Kansas and Neosho Valley Railroad Company, its successors and assigns, is hereby authorized and empowered to extend and construct its railroad from the southern boundary of Kansas south, through the Indian Territory, to Red River, at or near Preston, in the State of Texas, so as to connect with the railway now being constructed from Galveston to a point at or near Preston, in said State; and the right of way through the Indian Territory, wherever such right is now reserved or may hereafter be reserved to the United States by treaty with the Indian tribes, is hereby granted to

said company, to the same extent as granted by the sixth section of this act through the public lands; and in all cases where the right of way, as aforesaid, through the Indian lands, shall not be reserved to the government, the said company shall, before constructing its road, procure the consent of the tribe or tribes interested, which consent, with all its terms and conditions, shall be previously approved and indorsed by the President and filed with the Secretary of the Interior.

SEC. 9. *And be it further enacted*, That the same grants of lands through said Indian Territory are hereby made as provided in the first section of this act, whenever the Indian title shall be extinguished by treaty or otherwise, not to exceed the ratio per mile granted in the first section of this act: *Provided*, That said lands become a part of the public lands of the United States.

SEC. 10. *And be it further enacted*, That said Kansas and Neosho Valley Railroad Company, its successors and assigns, shall have the right to negotiate with, and acquire from any Indian nation or tribe, authorized by the United States to dispose of lands for railroad purposes, and from any other nation or tribe of Indians through whose lands said railroad may pass, subject to the approval of the President of the United States, or from any company or parties incorporated or authorized for such purposes, by such nation or tribe, or which such parties may have acquired under the laws of the United States.

SEC. 11. *And be it further enacted*, That any railroad company chartered under any law of the United States, or of the State of Kansas, which may have been heretofore or shall hereafter be

recognized and subsidized by any act of the Congress of the United States, may connect, unite, and consolidate with this railroad company, after the same shall be located to the valley of the Neosho River, upon just, fair, and equitable terms, to be agreed upon between the parties, and shall not be against the public interest or the interest of the United States; nor shall any road authorized to connect as aforesaid charge the road so connecting a greater tariff per mile for freight or passengers than is charged for the same per mile by its own road: *And provided further*, That should the Leavenworth, Lawrence and Fort Gibson Railroad Company, or the Union Pacific Railroad Company, southern branch, construct and complete its road to that point on the southern boundary of the State of Kansas where the line of said Kansas and Neosho Valley Railroad shall cross the same, before the said Kansas and Neosho Valley Railroad Company shall have constructed and completed its said road to said point, then and in that event the company so first reaching in completion the said point on the southern boundary of the State of Kansas shall be authorized, upon obtaining the written approval of the President of the United States to construct and operate its line of railroad from said point to a point at or near Preston, in the State of Texas, with grants of land according to the provisions of this act, but upon the further special condition, nevertheless, that said railroad company shall have commenced in good faith the construction thereof before the said Kansas and Neosho Valley Railroad Company shall have completed its said railroad to said point: *And provided further*, That said other railroad company so hav-

ing commenced said work in good faith, shall continue to prosecute the same with sufficient energy to insure the completion of the same within a reasonable time, subject to the approval of the President of the United States: *And provided further*, That the right of way through private property when not otherwise provided for in this act, or by the law of any State through which the road may pass, shall be obtained by said Kansas and Neosho Valley Railroad Company, or either of the other companies named in this act, in accordance with the provisions of section three of an act to amend an act entitled "An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes," approved July first, eighteen hundred and sixty-two.

Act of July 26, 1866 (14 Stats., p. 289).

Chap. CCLXX.—*An Act granting Lands to the State of Kansas to aid in the Construction of a southern Branch of the Union Pacific Railway and Telegraph, from Fort Riley, Kansas, to Fort Smith, Arkansas.*

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of aiding the Union Pacific Railroad Company, southern branch, the same being a corporation organized under the laws of the State of Kansas to construct and operate a railroad from Fort Riley, Kansas, or near said military reservation, thence down the valley of the Neosho River to the southern line of the State of Kansas, with a view to an extension

of the same through a portion of the Indian Territory to Fort Smith, Arkansas, there is hereby granted to the State of Kansas, for the use and benefit of said railroad company every alternate section of land or parts thereof designated by odd numbers, to the extent of five alternate sections per mile on each side of said road and not exceeding in all ten sections per mile; but in case it shall appear that the United States have, when the line of said road is definitely located, sold any section, or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid, from the public lands of the United States nearest to the sections above specified, so much land as shall be equal to the amount of such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached as aforesaid, which lands, thus indicated by the direction of the Secretary of the Interior, shall be reserved and held for the State of Kansas for the use of said company by the said Secretary for the purpose of the construction and operation of said railroad, as provided by this act: *Provided*, That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby, reserved and excepted from the operation of this act, except so far as it may be found

necessary to locate the route of said road through such reserved lands, in which case the right of way, two hundred feet in width, is hereby granted, subject to the approval of the President of the United States: *And provided further*, That said lands hereby granted shall not be selected beyond twenty miles from the line of said road.

* * * * *

SEC. 4. *And be it further enacted*, That as soon as said company shall file with the Secretary of the Interior maps of its line, designating the route thereof, it shall be the duty of *of* said Secretary to withdraw from the market the lands granted by this act, in such manner as may be best calculated to effect the purposes of this act and subserve the public interest.

SEC. 5. *And be it further enacted*, That the United States mail shall be transported on said road, and under the direction of the Post Office Department at such price as Congress may by law provide: *Provided*, That until such price is fixed by law the Postmaster-General shall have power to fix the compensation.

SEC. 6. *And be it further enacted*, That the right of way through the public lands be, and the same is hereby, granted to said Pacific Railroad Company, southern branch, its successors and assigns, for the construction of a railroad as proposed; and the right is hereby given to said corporation to take from the public lands adjacent to the line of said road material for the construction thereof. Said way is granted to said railroad to the extent of one hundred feet in width on each side of said road where it may pass through the public domain; also all necessary ground for station buildings, work-

shops, depots, machine-shops, switches, side-tracks, turn-tables, and water-stations.

SEC. 7. *And be it further enacted*, That the acceptance of the terms, conditions, and impositions of this act by the said Pacific Railroad Company, southern branch, shall be signified in writing, under the corporate seal of the said company, duly executed pursuant to the direction of its board of directors first had and obtained, which acceptance shall be made within one year after the passage of this act, and not afterwards, and shall be deposited with the Secretary of the Interior.

SEC. 8. *And be it further enacted*, That said Pacific Railroad Company, southern branch, its successors and assigns, is hereby authorized and empowered to extend and construct its railroad from the southern boundary of Kansas, south through the Indian Territory, with the consent of the Indians, and not otherwise, along the valley of Grand and Arkansas rivers, to Fort Smith, in the State of Arkansas; and the right of way through said Indian Territory is hereby granted to said company, its successors and assigns, to the extent of one hundred feet on each side of said road or roads, and all necessary grounds for stations, buildings, work-shops, machine-shops, switches, side-tracks, turn-tables, and water-stations.

SEC. 9. *And be it further enacted*, That the same grant[s] of lands through said Indian Territory are hereby made as provided in the first section of this act, whenever the Indian title shall be extinguished by treaty or otherwise, not to exceed the ratio per mile granted in the first section of this act: *Provided*, That said lands become a part of the public lands of the United States.

SEC. 10. *And be it further enacted*, That said Pacific Railroad Company, southern branch, its successors and assigns, shall have the right to negotiate with, and acquire title to land for railroad purposes from, any Indian nation or tribe authorized by the United States to dispose of lands, and from any other nation or tribe of Indians through whose lands said railroad may pass, subject to the approval of the United States, or from any company or parties incorporated or authorized for such purposes, by such nation or tribe, or which such parties may have acquired under the laws of the United States.

SEC. 11. *And be it further enacted*, That any railroad company chartered under any law of the United States, or of any State which may have been heretofore or shall hereafter be organized by any act of the Congress of the United States, may connect, unite, and consolidate with this railroad company, after the same shall be located to the valley of the Neosho or Grand River, upon just, fair, and equitable terms, to be agreed upon between the parties, as shall not be against the public interest, or the interest of the United States.

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MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 25. Argued October 28, 29, 1914.—Decided November 9, 1914.

Whether the concession of lands in Indian Territory under § 9 of the Land Grant Act of July 25, 1866, c. 241, 19 Stat. 236, was a grant *in præsenti* or a covenant to convey, it was dependent upon fulfilment of the express conditions precedent that the Indian title be extinguished and when extinguished become public lands of the United States; and those conditions have not been fulfilled.

A statute granting public lands or Indian lands which may become public lands, will not be construed as including Indian lands afterwards allotted in severalty under a treaty made immediately before the enactment of the statute, as to do so would be to accuse the Government of bad faith with the Indian owners of the land.

Grants from the Government are to be strictly construed against the grantee.

47 Ct. Cls. 59, affirmed.

THE facts, which involve the construction of § 9 of the Land Grant Act of July 28, 1866, and the provisions therein contained for grants of lands in Indian Territory on the extinguishment of the Indian title, are stated in the opinion.

Mr. H. S. Priest and *Mr. Joseph M. Bryson*, with whom *Mr. A. B. Browne*, *Mr. C. L. Jackson*, *Mr. W. W. Brown* and *Mr. Alexander Britton* were on the brief, for appellant.

The Solicitor General and *Mr. Assistant Attorney General Thompson* for the United States.

MR. JUSTICE HOLMES delivered the opinion of the court.

This claim, as construed by the claimant and appellant is based upon covenants supposed to be imported by an act of Congress of July 25, 1866, c. 241, § 9. 14 Stat. 236. Upon demurrer it was dismissed by the Court of Claims. 47 C. Cl. 59. The largeness of the demand tends to induce a correspondingly voluminous statement, but the issue really is narrow and the material facts are few.

The United States had made land grants to the great roads running east and west but had not provided for a connection between those roads and the Gulf, through Kansas and the Indian Territory to the south. To that end, the act of July 25, 1866, after granting to Kansas, for the use of a road to be built through eastern Kansas from the eastern terminus of the Union Pacific between Kansas and Missouri, ten alternate sections per mile on each side of the road, § 1, authorized the company mentioned to extend its road from the southern boundary of Kansas south, through the Indian Territory to Red River, at or near Preston, in Texas, so as to connect with a road then being constructed from Galveston to that point. Section 8. The appellant also had been authorized by charter to build a road running southerly from a point on the Union Pacific to where the southern boundary of Kansas crosses the Neosho River, and had acquired a land grant; and the act of July 25, 1866, went on to provide that if the appellant, under its former name of Union

Pacific Railway, Southern Branch, first completed its road to the point of crossing the southern boundary of Kansas, it should be authorized to construct its line to the point near Preston, "with grants of land according to the provisions of this act." The right of way was granted in accordance with treaties with the Indians and is not in question here.

The appellant finished its road first, built the southern extension and acquired the rights to land under the act of 1866, and the question is what rights it has, in the event that has happened, under § 9. That section enacted "That the same grants of lands through said Indian Territory are hereby made as provided in the first section of this act, whenever the Indian title shall be extinguished by treaty or otherwise, not to exceed the ratio per mile granted in the first section of this act; *Provided*, That said lands become a part of the public lands of the United States." This part of the Indian Territory was occupied by the five civilized tribes, and what has happened is that under acts of Congress the land concerned has been distributed in severalty to the members of those tribes or sold for their benefit.

Taken literally the grant or covenant of the United States was subject to two conditions precedent. 'Whenever the Indian title shall be extinguished' means when and not until that occurs, and contemplates it as something that may or may not come to pass. The proviso attaches the further condition that if the Indian title shall be extinguished it must be extinguished in such a way that the lands become a part of the public domain. It cannot be said that 'whenever' imports that sooner or later the Indian title will and shall be disposed of. The Indians had to be considered and it could not be assumed that they would be removed to another place, as they had been removed before. It cannot be said, either, that on the face of the clause the proviso adds nothing and means

only that on extinction of the Indian title the rights of the railroad shall attach as if the land were public land. The section taken by itself and on its face excludes the claimant's interpretation that the United States made an absolute promise or grant, and it excludes it none the less that certain services were to be rendered by the road to the United States as one of the terms of the grant of a right of way which the railroad got.—On this literal reading of the statute the conditions have not been fulfilled. The land has remained continuously appropriated to the use of the Indians or has been sold for their benefit. It never for a moment has become a part of the public domain in the ordinary sense. *Newhall* v. *Sanger*, 92 U. S. 761, 763. *Union Pacific R. R. Co.* v. *Harris*, 215 U. S. 386, 388. It is argued that the grant attached the moment that the tribal title ceased, whatever it was. But, still looking only at the face of the act and seeing the intent to respect the Indian rights, we cannot read it as preventing the United States from making the change from tribal to several possession or dealing with this land in any way deemed most beneficial for those whose rights were treated as paramount. The proviso that the land must become public land shows that a mere change from tribal title was not enough. Taken literally the grant only applied in case the Indians were removed or bought off the land.

The facts existing at the time confirm the literal interpretation of the act. Less than a week before the passage of the statute the United States had made a treaty with the Cherokees that contemplated the possible allotment of their share in this land to be held in severalty. Treaty of July 19, 1866, Art. 16, 14 Stat. 799, 804. On June 14, 1866, it had agreed with the Creeks that their lands should be forever set apart as a home for the Nation. 14 Stat. 785. And by a treaty of April 28, 1866, Art. 11, it had agreed with the Choctaws and Chickasaws that

they might have their lands surveyed and divided up, reciting that it was believed that the holding of the land in severalty would promote the general civilization of said Nation. 14 Stat. 769, 774. Whether or not, as the Government contends, the title of these tribes to the land in controversy was higher than the original possessory right, the United States, as the appellant must be taken to have known, just before its covenant with the railroad, had been holding out to the Indians the desirableness and possibility of dividing up their lands into individual holdings; and it would be to accuse the Government of bad faith to one party or the other to suggest that it forthwith agreed with the appellant that the moment such a division and allotment took place the appellant thereby should acquire a paramount title and render the allotment vain. See further *Kansas* v. *United States*, 204 U. S. 331, 341, 342.

The action of Congress in making the allotment to individuals shows in express terms that it did not suppose that the railroads would, or intend that they should, acquire any new rights. Act of March 1, 1901, c. 676, § 23; 31 Stat. 861, 867. July 1, 1902, c. 1362; 32 Stat. 641. July 1, 1902, c. 1375; 32 Stat. 716. April 26, 1906, c. 1876, § 27; 34 Stat. 137, 148. Our conclusion from the words of the statute and the circumstances seems to us too plain to require a reference to the rule of strict construction against the grantee of the Government in case of doubt, and seems to us unaffected by the argument that a grant *in præsenti* was made by § 9. It appears to us that the appellant's claim stands most strongly if based upon a covenant—but, covenant or grant, the concession of the United States was dependent upon conditions that have not been fulfilled.

Judgment affirmed.